

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 449.

JOHN WYNNE, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR  
THE TERRITORY OF HAWAII.

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- 1 In the District Court of the United States, in and for the district and Territory of Hawaii.

JOHN WYNNE, PLAINTIFF IN ERROR,  
*versus*  
 THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

*Order extending time to transmit record on writ of error.*

Now, on this 23rd day of March, A. D. 1909, it appearing from the representations of the clerk of this court that it is impracticable for said clerk of this court to prepare and transmit to the clerk of the United States Supreme Court, at Washington, District of Columbia, the transcript of the record on writ of error in the above entitled cause, within the time limited therefor by the citation heretofore issued in this cause, it is ordered that the time within which the clerk of this court shall prepare and transmit said transcript of the record on writ of error in this cause, together with the said writ and all papers required by the praecipe of plaintiff in error herein, to the clerk of the United States Supreme Court, be, and the same is hereby, extended sixty (60) days from this date.

Honolulu, Hawaii, March 23rd, 1909.

S. B. DOLE,  
*Judge United States District Court.*

- 2 Due service of the above order, and receipt of a copy thereof, are hereby admitted this 23rd day of March, A. D. 1909.

THE UNITED STATES OF AMERICA,  
*Defendant in error above named,*  
 By ROBT. W. BRECKONS,  
*United States Attorney.*

- 2½ (Indorsed:) No. 366. United States District Court, Territory of Hawaii. John Wynne, plaintiff in error, vs. The United States of America, defendant in error. Order extending time to transmit record on writ of error. Filed: March 23, 1909. A. E. Murphy, clerk.

- 3 In the United States District Court for the Territory of Hawaii.

JOHN WYNNE, PLAINTIFF IN ERROR,  
*versus*  
 THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

STATEMENT.

*Time of commencing cause.*

October 25, 1907. Indictment filed.

*Names of original parties.*

Plaintiff: The United States of America.

Defendant: John Wynne.

*Dates of filing of pleadings.*

- October 25, 1907. Indictment.
- December 2, 1907. Demurrer to indictment.
- December 18, 1907. Motion to compel election.
- January 25, 1908. Ruling on motion to compel election.
- November 9, 1908. Defendant's motion for direct verdict.
- November 9, 1908. Defendant's requested instructions.
- November 9, 1908. Court's charge to the jury.
- November 9, 1908. Exceptions of defendant relating to instructions.
- November 9, 1908. Verdict.
- November 13, 1908. Motion in arrest of judgment.
- November 13, 1908. Judgment and sentence.
- March 23, 1909. Defendant's bill of exceptions.
- 4      March 23, 1909. Notice of hearing petition for writ of error.
- March 23, 1909. Petition for writ of error.
- March 23, 1909. Assignment of errors.
- March 23, 1909. Writ of error.
- March 23, 1909. Order allowing writ of error.
- March 23, 1909. Citation.
- March 23, 1909. Order as to transmission of exhibit.
- March 23, 1909. Order extending time to transmit record on writ of error.
- March 25, 1909. Praecipe.

*Time when trial was had.*

The above entitled cause came on for trial in the United States District Court for the Territory of Hawaii, before the Honorable Sanford B. Dole, judge of said court, on the following days, to wit: October 22, 23, 26, 27, 28, 29, 30; November 2, 3, 4, 5, 6, 7, and 9, 1908.

UNITED STATES OF AMERICA,

*Territory of Hawaii, ss.*

I, A. E. Murphy, clerk of the United States District Court for the Territory of Hawaii, do hereby certify the foregoing to be a full, true, and correct statement showing the time of commencement of the above entitled cause, the names of the original parties thereto, the several dates when the respective pleadings were filed, the time when the trial was had and the name of the judge hearing the same.

In witness whereof I have hereunto set my hand and affixed the seal of said district court this 24th day of April, 1909.

[SEAL.]

A. E. MURPHY,

*Clerk of the United States District Court  
for the Territory of Hawaii.*

5 [From minutes of the United States District Court, vol. 4, page 631, Friday, October 25, 1907.]

Title of Court and Cause.

The grand jury came into court on this day and by its foreman returned a true bill of indictment against said defendant, charging murder. And thereupon the court ordered said indictment filed and that a bench warrant issue herein.

6 THE UNITED STATES OF AMERICA,  
*District of Hawaii, ss.*

In the District Court of the United States in and for the district aforesaid at the October term thereof, A. D. 1907.

*First count.*

The grand jurors of the United States, empaneled, sworn, and charged at the term aforesaid of the court aforesaid, on their oath present that John Wynne, late of the district aforesaid, on the twentieth day of September, in the year of our Lord one thousand nine hundred and seven, with force and arms, on the high seas, and within the jurisdiction of this court and within the admiralty and maritime jurisdiction of the said United States of America, and out of the jurisdiction of any particular State of the said United States of America, in and on board of a certain American vessel, the same being then and there a vessel called and named "Rosecrans," then and there belonging to the "National Oil and Transportation Company," a corporation organized under and by virtue of the laws of the State of California, in and upon one Archibald F. McKinnon, then and there being on board said vessel, unlawfully, feloniously, wilfully and of his malice aforethought, did make an assault, and that the said John Wynne then and there, to wit, upon the high seas, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, in and on

7 board of said vessel, with a certain hammer, him, the said Archibald F. McKinnon, in and upon the head of the said Archibald F. McKinnon, unlawfully, feloniously, wilfully and of his malice aforethought did strike, penetrate, and wound, thereby then and there, to wit, upon the high seas, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, in and on board of said vessel, giving unto the said Archibald F. McKinnon, in and upon the head of the said Archibald F. McKinnon, divers mortal wounds, of which said mortal wounds the said Archibald F. McKinnon then and there to wit, upon

the high seas, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, in and on board of said vessel, instantly died. And so the jurors aforesaid upon their oath aforesaid do say and present that the said John Wynne, unlawfully, feloniously, wilfully, and of his malice aforethought him the said Archibald F. McKinnon, then and there, to wit, upon the high seas, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, in and on board of said vessel, in manner and form aforesaid, did kill and murder; against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

8 And the jurors aforesaid, upon their oath aforesaid, do further present and say that the said District of Hawaii is the district of the United States of America into which the said John Wynne was first brought after committing the offense aforesaid.

(Sgd.)

ROBT. W. BRECKONS,

*United States Attorney for the District of Hawaii.*

A true bill.

J. F. Woods,

*Foreman of the Grand Jury.*

*Second count.*

And the said grand jurors of the United States, empaneled, sworn, and charged at the term aforesaid of the court aforesaid, on their oath aforesaid, present that John Wynne, late of the district aforesaid, on the twentieth day of September, in the year of our Lord one thousand nine hundred and seven, with force and arms, on the high seas, and within the jurisdiction of this court and within the admiralty and maritime jurisdiction of the said United States of America, and out of the jurisdiction of any particular State of the said United States of America, in and on board of a certain American vessel, the same being then and there a vessel called and named "Rosecrans," then and there belonging to the "National Oil and Transportation Company," a corporation organized under and by virtue of the laws of the State of California, in and upon one Archibald F. McKinnon, then and there being on board of said vessel, unlawfully, feloniously, wilfully, and of his malice aforethought, did make an assault, and that the said John Wynne then and there, to wit, upon the high seas, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, in and on board of said vessel, with a certain hammer, him, the said Archibald F. McKinnon, in and upon

the head of the said Archibald F. McKinnon, unlawfully, feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound, thereby then and there, to wit, upon the high seas, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, in and on board of said vessel, giving unto the said Archibald F. McKinnon in and upon the head of the said Archibald F. McKinnon, divers mortal wounds, of which said mortal wounds the said Archibald F. McKinnon then and there, to wit, upon the high seas, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, languished, and thereafter, and on, to wit, the twentieth day of September, in the year of our Lord one thousand nine hundred and seven, at and within the Territory and District of Hawaii, to wit, on the island of Oahu, at and within the said Territory and District of Hawaii, languishing, died. And so the jurors aforesaid, upon their oath aforesaid, do say and present that the said John Wynne unlawfully, feloniously, wilfully, and of his malice aforethought, him, the said Archibald F. McKinnon, then and there, to wit, upon the high seas, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, in and on board of said vessel, in manner and form aforesaid, did kill and murder; against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

10 And the jurors aforesaid, upon their oath aforesaid, do further present and say, that the said District of Hawaii is the district of the United States of America into which the said John Wynne was first brought after committing the offense aforesaid.

(Sgd) ROBT. W. BRECKONS,

*United States Attorney for the District of Hawaii.*

A true bill.

J. F. Woods,

*Foreman of the Grand Jury.*

*Third count.*

And the said grand jurors of the United States, empaneled, sworn, and charged at the term aforesaid of the court aforesaid, on their oath aforesaid, present that John Wynne, late of the district aforesaid, on the twentieth day of September, in the year of our Lord one thousand nine hundred and seven, with force and arms, in a certain haven of the Pacific Ocean, to wit, the harbor of Honolulu, in the District and Territory of Hawaii, and within the jurisdiction of this court and within the admiralty and maritime jurisdiction of the said United States of America, and out of the jurisdiction of any particular State of the said United States of America, in and on board of a certain American vessel, the same being then and there a



vessel called and named "Rosecrans," then and there belonging to the "National Oil and Transportation Company," a corporation organized under and by virtue of the laws of the State of California, in and upon one Archibald F. McKinnon, then and there being on

board of said vessel, unlawfully, feloniously, wilfully, and of  
11 his malice aforethought, did make an assault, and that the said

John Wynne then and there, to wit, in a certain haven of the Pacific Ocean, to wit, the harbor of Honolulu, in the District and Territory of Hawaii, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, in and on board of said vessel, with a certain hammer, him, the said Archibald F. McKinnon, in and upon the head of the said Archibald F. McKinnon, unlawfully, feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound, thereby then and there, to wit, in a certain haven of the Pacific Ocean, to wit, the harbor of Honolulu, in the District and Territory of Hawaii, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, in and on board of said vessel, giving unto the said Archibald F. McKinnon, in and upon the head of the said Archibald F. McKinnon, divers mortal wounds, of which said mortal wounds the said Archibald F. McKinnon then and there, to wit, in a certain haven of the Pacific Ocean, to wit, the harbor of Honolulu, in the District and Territory of Hawaii, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, in and on board of said vessel, instantly died. And so the jurors aforesaid, upon their oath aforesaid, do say and present that the said John Wynne unlawfully, feloniously, wilfully, and of his malice aforethought, him, the said Archibald F. McKinnon, then and there, to wit, in a certain haven of the Pacific Ocean, to wit, the harbor of Honolulu, in the District and

Territory of Hawaii, within the admiralty and maritime  
12 jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, in and on board of said vessel, in manner and form aforesaid, did kill and murder, against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

And the jurors aforesaid, upon their oath aforesaid, do further present and say, that the said District of Hawaii is the district of the United States of America into which the said John Wynne was first brought after committing the offense aforesaid.

ROBT. W. BRECKONS,

*United States Attorney for the District of Hawaii.*

A true bill.

(Sd) J. F. WOODS,

*Foreman of the Grand Jury.*



*Fourth count.*

And the said grand jurors of the United States, empaneled, sworn, and charged at the term aforesaid of the court aforesaid, on their oath aforesaid, present that John Wynne, late of the district aforesaid, on the twentieth day of September, in the year of our Lord one thousand nine hundred and seven, with force and arms, in a certain haven of the Pacific Ocean, to wit, the harbor of Honolulu, in the District and Territory of Hawaii, and within the jurisdiction of this court and within the admiralty and maritime jurisdiction of the said United States of America, and out of the jurisdiction of any particular State of the said United States of America, in and on  
13 board of a certain American vessel, the same being then and there a vessel called and named "Rosecrans," then and there belonging to the "National Oil and Transportation Company," a corporation organized under and by virtue of the laws of the State of California, in and upon one Archibald F. McKinnon, then and there being on board of said vessel, unlawfully, feloniously, wilfully, and of his malice aforethought, did make an assault, and that the said John Wynne then and there, to wit, in a certain haven of the Pacific Ocean, to wit, the harbor of Honolulu, in the District and Territory of Hawaii, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, in and on board of said vessel, with a certain hammer, him, the said Archibald F. McKinnon, in and upon the head of the said Archibald F. McKinnon, unlawfully, feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound, thereby then and there, to wit, in a certain haven of the Pacific Ocean, to wit, the harbor of Honolulu, in the District and Territory of Hawaii, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, in and on board of said vessel, giving unto the said Archibald F. McKinnon, in and upon the head of the said Archibald F. McKinnon, divers mortal wounds, of which said mortal wounds the said Archibald F. McKinnon then and there, to wit, in a certain haven of the Pacific Ocean, to wit, the harbor of Honolulu, in the District and Territory of Hawaii, within  
14 the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, languished, and thereafter and on, to wit, the twentieth day of September, in the year of our Lord one thousand nine hundred and seven, at and within the Territory and District of Hawaii, to wit, on the island of Oahu, at and within the said Territory and District of Hawaii, languishing, died. And so the jurors aforesaid, upon their oath aforesaid, do say and present that the said John Wynne unlawfully, feloniously, wilfully, and of his malice aforethought, him, the said Archibald F. McKinnon, then and there, to wit, in a certain haven of

the Pacific Ocean, to wit, the harbor of Honolulu, in the District and Territory of Hawaii, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, in and on board of said vessel, in manner and form aforesaid, did kill and murder, against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

And the jurors aforesaid, upon their oath aforesaid, do further present and say, that the said District of Hawaii is the district of the United States of America into which the said John Wynne was first brought after committing the offense aforesaid.

(Sgd) ROBT. W. BRECKONS,

*United States Attorney for the District of Hawaii.*

A true bill.

(Sgd) J. F. Woods,

*Foreman of the Grand Jury.*

15

*Fifth count.*

And the said grand jurors of the United States, empaneled, sworn, and charged at the term aforesaid of the court aforesaid, on their oath aforesaid, present that John Wynne, late of the district aforesaid, on the twentieth day of September, in the year of our Lord one thousand nine hundred and seven, with force and arms, in a certain arm of the Pacific Ocean, to wit, the harbor of Honolulu, in the District and Territory of Hawaii, and within the jurisdiction of this court and within the admiralty and maritime jurisdiction of the said United States of America, and out of the jurisdiction of any particular State of the said United States of America, in and on board of a certain American vessel, the same being then and there a vessel called and named "Rosecrans," then and there belonging to the "National Oil and Transportation Company," a corporation organized under and by virtue of the laws of the State of California, in and upon one Archibald F. McKinnon, then and there being on board of said vessel, unlawfully, feloniously, wilfully, and of his malice aforethought, did make an assault, and that the said John Wynne then and there, to wit, in a certain arm of the Pacific Ocean, to wit, the harbor of Honolulu, in the District and Territory of Hawaii, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, in and on board of said vessel, with a certain hammer, him, the said Archibald F. McKinnon, in and upon the head of the said Archibald F. McKinnon, unlawfully, feloniously, willfully, and of his malice aforethought, did strike, penetrate, and wound, thereby then and there, to wit, in a certain arm of the Pacific Ocean, to wit, the harbor of Honolulu,

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in the District and Territory of Hawaii, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, in and on board of said vessel, giving unto the said Archibald F. McKinnon, in and upon the head of the said Archibald F. McKinnon, divers mortal wounds, of which said mortal wounds the said Archibald F. McKinnon then and there, to wit, in a certain arm of the Pacific Ocean to wit, the harbor of Honolulu, in the District and Territory of Hawaii, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, in and on board of said vessel, instantly died. And so the jurors aforesaid upon their oath aforesaid do say and present that the said John Wynne, unlawfully, feloniously, wilfully, and of his malice aforethought, him, the said Archibald F. McKinnon, then and there, to wit, in a certain arm of the Pacific Ocean, to wit, the harbor of Honolulu, in the District and Territory of Hawaii, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, in and on board of said vessel, in manner and form aforesaid, did kill and murder; against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

17 And the jurors aforesaid, upon their oath aforesaid, do further present and say that the said District of Hawaii is the district of the United States of America into which the said John Wynne was first brought after committing the offense aforesaid.

(Sgd.) ROBT. W. BRECKONS,

*United States Attorney for the District of Hawaii.*

A true bill.

(Sgd.) J. F. WOODS,

*Foreman of the Grand Jury.*

*Sixth count.*

And the said grand jurors of the United States, empaneled, sworn, and charged at the term aforesaid of the court aforesaid, on their oath aforesaid, present that John Wynne, late of the district aforesaid, on the twentieth day of September, in the year of our Lord one thousand nine hundred and seven, with force and arms, in a certain arm of the Pacific Ocean, to wit the harbor of Honolulu, in the District and Territory of Hawaii, and within the jurisdiction of this court and within the admiralty and maritime jurisdiction of the said United States of America, and out of the jurisdiction of any particular State of the said United States of America, in and on board of a certain American vessel, the same being then and there

a vessel called and named "Rosecrans," then and there belonging to  
the "National Oil and Transportation Company," a corpo-  
18 ration organized under and by virtue of the laws of the State  
of California, in and upon one Archibald F. McKinnon, then  
and there being on board of said vessel, unlawfully, feloniously, wil-  
fully, and of his malice aforethought, did make an assault, and that  
the said John Wynne then and there, to wit, in a certain arm of the  
Pacific Ocean, to wit, the harbor of Honolulu, in the District and  
Territory of Hawaii, within the admiralty and maritime jurisdiction  
of the United States of America, and out of the jurisdiction of  
any particular State thereof, and within the jurisdiction of this  
court, in and on board of said vessel, with a certain hammer, him,  
the said Archibald F. McKinnon, in and upon the head of the said  
Archibald F. McKinnon, unlawfully, feloniously, wilfully, and of his  
malice aforethought, did strike, penetrate, and wound, thereby then  
and there, to wit, in a certain arm of the Pacific Ocean, to wit the  
harbor of Honolulu, in the District and Territory of Hawaii, within  
the admiralty and maritime jurisdiction of the United States of  
America, and out of the jurisdiction of any particular State thereof,  
and within the jurisdiction of this court, in and on board of said  
vessel, giving unto the said Archibald F. McKinnon, in and upon the  
head of the said Archibald F. McKinnon, divers mortal wounds, of  
which said mortal wounds, the said Archibald F. McKinnon, then  
and there, to wit, in a certain arm of the Pacific Ocean, to wit, the  
harbor of Honolulu, in the District and Territory of Hawaii, within  
the admiralty and maritime jurisdiction of the United States of  
America, and out of the jurisdiction of any particular State thereof,  
and within the jurisdiction of this court, languished, and thereafter,  
and on to wit, the twentieth day of September, in the year of our  
Lord one thousand nine hundred and seven, at and within the  
19 Territory and District of Hawaii, to wit, on the island of  
Oahu, at and within the said Territory and District of  
Hawaii, languishing, died. And so the jurors aforesaid upon their  
oath aforesaid do say and present that the said John Wynne, unlaw-  
fully, feloniously, wilfully, and of his malice aforethought, him, the  
said Archibald F. McKinnon, then and there, to wit, in a certain  
arm of the Pacific Ocean, to wit, the harbor of Honolulu in the Dis-  
trict and Territory of Hawaii, within the admiralty and maritime  
jurisdiction of the United States of America, and out of the jurisdic-  
tion of any particular State thereof, and within the jurisdiction of  
this court, in and on board of said vessel, in manner and form afore-  
said, did kill and murder; against the peace and dignity of the  
United States of America, and contrary to the form of the statute  
of the said United States of America in such case made and pro-  
vided.

And the jurors aforesaid, upon their oath aforesaid, do further  
present and say, that the said District of Hawaii is the district of

the United States of America into which the said John Wynne was first brought after committing the offense aforesaid.

(Sgd) ROBT. W. BRECKONS,  
*United States Attorney for the District of Hawaii.*

A true bill.

(Sgd) J. F. Woods,  
*Foreman of the Grand Jury.*

(Endorsed:) Title of court and cause. Indictment for murder. Filed, Oct. 25, 1907. Frank L. Hatch, clerk, by A. E. Murphy, deputy clerk.

20 [From minutes of the United States District Court, vol. 4, page 639, Saturday, October 26, 1907.]

#### Title of Court and Cause.

Now comes Mr. Robert W. Breckons, United States district attorney, and said defendant in person and this cause is called for arraignment. And thereupon, on motion of said United States district attorney, it is ordered by the court that this cause be continued for arraignment until Saturday, November 2, 1907, at 10 o'clock a. m.

21 [From minutes of the United States District Court, vol. 4, page 672, Saturday, November 2, 1907.]

#### Title of Court and Cause.

Now comes Mr. Robert W. Breckons, United States district attorney, and said defendant in person and this cause is called for arraignment. And thereupon, on motion of said United States district attorney, it is by the court ordered that this cause be continued for arraignment until Monday, November 11, 1907, at 10 o'clock a. m.

22 [From minutes of the United States District Court, vol. 5, page 3, Monday, November 11th, 1907.]

#### Title of Court and Cause.

Now comes Mr. Robert W. Breckons, United States district attorney, and said defendant in person, and Mr. Charles F. Clemons, appearing on behalf of the firm of Thompson & Clemons, counsel for defendant, and this cause is called for arraignment. And thereupon the indictment herein is read to said defendant. And upon motion of counsel for defendant and consent of said United States district attorney it is by the court ordered that this cause be continued for plea until November 25, 1907, at 10 o'clock a. m.

23 [From minutes of the United States District Court, vol. 5, page 34, Monday, November 25, 1907.]

#### Title of Court and Cause.

Now comes Mr. Frank E. Thompson, of counsel for defendant herein, and moves the court that this cause, heretofore set for plea

for this day, be continued until December 2, 1907, at 10 o'clock a. m., and Mr. J. J. Dunne, assistant United States district attorney, being present and consenting thereto, the court grants said motion and it is so ordered.

24 [From minutes of the United States District Court, vol. 5, page 51, Monday, December 2nd, 1907.]

Title of Court and Cause.

Now comes Mr. F. E. Thompson, of counsel for defendant, and files in open court a demurrer to the indictment herein and moves the court that said demurrer stand submitted without argument, stating that such was agreeable to Mr. Robert W. Breckons, United States district attorney, which motion the court granted and it was so ordered. And thereupon it was by the court ordered that this cause, heretofore set for plea for this day, be continued until December 7, 1907, at 10 o'clock a. m.

25 In the United States District Court for the District of the Territory of Hawaii.

UNITED STATES OF AMERICA	}
<i>versus</i>	
JOHN WYNNE, DEFENDANT.	

*Demurrer to indictment.*

Comes now defendant, John Wynne, by his attorneys, Thompson & Clemons, and demurs to the indictment herein and to the several counts thereof on the grounds following, to wit:

1. As to the "first count" of the said indictment on the ground that the same does not state facts sufficient to constitute any crime or offense within, under, or against the laws of the United States of America;

2. As to the "second count" of said indictment, on the ground that the same does not state facts sufficient to constitute any crime or offense within, under, or against the laws of the United States of America;

3. As to the "third count" of said indictment, on the ground that the same does not state facts sufficient to constitute any crime or offense within, under, or against the laws of the United States of America;

4. As to the "fourth count" of said indictment, on the ground that the same does not state facts sufficient to constitute any crime or offense within, under, or against the laws of the United States of America;

26 5. As to the "fifth count" of said indictment on the ground that the same does not state facts sufficient to constitute any crime or offense within, under, or against the laws of the United States of America;



6. As to the "sixth count" of said indictment on the ground that the same does not state facts sufficient to constitute any crime or offense within, under, or against the laws of the United States of America;

7. As to said indictment as a whole, on the ground that the several counts thereof are inconsistent with each other;

8. As to the indictment as a whole, on the ground of variance between the several counts thereof.

Wherefore defendant prays that he be hence dismissed.

JOHN WYNNE,  
Defendant, by his attorneys,  
(Sgd) THOMPSON & CLEMONS.

HONOLULU, December 2nd, 1907.

(Endorsed:) Title of court and cause. Demurrer to indictment. Filed Dec. 2nd, 1907. Frank L. Hatch, clerk, by (Sgd) A. E. Murphy, deputy clerk.

27 [From minutes of the United States District Court, vol. 5, page 61, Saturday, December 7, 1907]

#### Title of Court and Cause.

Now comes Mr. J. J. Dunne, assistant United States district attorney, and said defendant in person and Mr. F. E. Thompson, of counsel for defendant, and this cause is duly called for plea. And thereupon, on motion of said assistant United States district attorney, it is by the court ordered that this cause be continued for plea until December 14, 1907, at 10 o'clock a. m.

28 [From minutes of the United States District Court, vol. 5, page 72, Saturday, December 14, 1907.]

#### Title of Court and Cause.

Now comes Mr. Robert W. Breckons, United States district attorney, and said defendant in person and Mr. F. E. Thompson, of counsel for defendant, and the court on this day rendered its oral decision, overruling the demurrer filed to the indictment herein, to which decision counsel for defendant duly excepted. And thereupon, on motion of counsel for defendant, it is by the court ordered that this cause be continued until December 18, 1907, at 10 o'clock a. m., for plea.

29 [From minutes of the United States District Court, vol. 5, page 79, Wednesday, December 18th, 1907.]

#### Title of Court and Cause.

Now comes Mr. Robert W. Breckons, United States district attorney, and said defendant in person and Mr. F. E. Thompson, of

counsel for defendant, and this cause is duly called for plea. And thereupon, counsel for defendant presents and files in open court a motion to compel the prosecution to elect upon which count in the indictment it proposes to try said defendant. And thereupon said motion was submitted without argument and by the court taken under advisement.

30 In the United States District Court, Territory of Hawaii,  
October term, 1907.

UNITED STATES OF AMERICA }  
vs. }  
JOHN WYNNE, DEFENDANT. }

*Motion to compel election.*

Comes now defendant, John Wynne, in his own proper person, and moves the court now here for an order requiring the United States of America to elect upon which count, if any, of the indictment in the above-entitled matter it proposes to proceed to trial and ask for a conviction of the defendant as charged.

This motion is upon the grounds that the said defendant, John Wynne, can not safely or intelligently proceed to plead, go to trial, or proceed at all upon the said indictment, for the reason that the several counts thereof differ essentially as to the place the said alleged homicide was committed.

All the papers, pleadings, the record of the court herein, the clerk's minutes and the affidavit of said John Wynne, hereto attached, are referred to and made a part hereof as fully to all intents and purposes as if the same were herein specifically set out.

(Sgd) JOHN WYNNE, *Defendant.*  
THOMPSON & CLEMONS,  
*Attorneys for Defendant.*

31 In the United States District Court, Territory of Hawaii,  
October term, 1907.

UNITED STATES OF AMERICA }  
vs. }  
JOHN WYNNE, DEFENDANT. }

UNITED STATES OF AMERICA,  
*Territory of Hawaii, County of Oahu, ss:*

John Wynne, defendant herein, being first duly sworn, deposes and says that he has heard the indictment herein read and is generally familiar with the contents thereof; that he is informed by his counsel herein that he can not safely plead, go to trial, or proceed upon the charges contained in said indictment as the same now stand, for the reason that the several counts thereof as therein laid



differ essentially as to the place of the alleged homicide committed, as therein alleged.

(Sgd) JOHN WYNNE.

Subscribed and sworn to before me this 18th day of December, A. D. 1907.

[SEAL.]

(Sgd) F. L. HATCH,  
Notary Public, First Judicial Circuit,  
County of Oahu, Territory of Hawaii.

(Endorsed:) Title of court and cause. Motion to compel election. Filed Dec. 18th, 1909. Frank L. Hatch, clerk. By A. E. Murphy, deputy clerk.

32 [From minutes of the United States district court, vol. 5, page 123, Saturday, January 25th, 1908.]

### Title of Court and Cause.

Now comes Mr. W. T. Rawlins, assistant United States district attorney, and said defendant in person, and Mr. C. F. Clemons, of counsel for defendant, and the court on this day renders its written decision herein, sustaining defendant's motion in so far as to compel the prosecution to elect and proceed either on the first two counts or the last four counts of the indictment herein.

33 In the United States District Court for the Territory of Hawaii, October, A. D. 1908, term.

THE UNITED STATES OF AMERICA, PLAINTIFF,	} No. 336. Indictment for murder.
vs.	
JOHN WYNNE, DEFENDANT.	

### *Ruling on motion to compel election.*

The defendant has moved that the court require the prosecution to elect upon which count, if any, in the indictment in this cause it proposes to proceed to trial, on the ground that the defendant can not safely or intelligently proceed to plea and go to trial upon the indictment because the several counts differ essentially as to the place where the alleged homicide was committed.

The indictment contains six counts, two of which allege the homicide to have been committed on the high seas, two that it was committed "in a certain haven of the Pacific Ocean, to wit, the harbor of Honolulu," and two that it was committed "in a certain arm of the Pacific Ocean, to wit, the harbor of Honolulu." There are other differences between the counts which, however, are not brought up under this motion.

As to the description of the locality, I find that the last four counts substantially describe the same place, in that a haven of the

34 Pacific Ocean, to wit, the harbor of Honolulu and a certain arm of the Pacific Ocean, to wit, the harbor of Honolulu, describe the same locality. I consider that it is due to the defendant that he be tried upon the charge of having committed the offense at only one of these localities, and will therefore allow the motion so far as to require the prosecution to elect whether it will proceed upon the first two counts of the indictment or upon the last four.

(Sgd) SANFORD B. DOLE,

*Judge, U. S. District Court.*

JANUARY 25, 1908.

(Indorsed:) Title of court and cause. Ruling on motion to compel election. Filed January 25, 1908. Frank L. Hatch, clerk. By A. E. Murphy, deputy clerk.

35 [From minutes of the United States District Court, vol. 5, page 147, Monday, February 24, 1908.]

#### Title of Court and Cause.

Now comes Mr. Robert W. Breckons, United States district attorney, and said defendant in person, and Mr. Frank E. Thompson, of counsel for defendant, and said United States district attorney, in accordance with the ruling of the court heretofore made, announced that the prosecution had elected to proceed to trial on the last four counts of the indictment herein. And thereupon said defendant was asked what his plea was to the indictment herein. And thereupon said defendant enters a plea of "not guilty." And upon motion of said United States district attorney, and consent of counsel for defendant, it was ordered by the court that this cause be continued until March 2, 1908, to be then set for trial.

36 [From minutes of the United States District Court, vol. 5, page 156, Monday, March 2, 1908.]

#### Title of Court and Cause.

The court on this day upon the motion of Mr. W. T. Rawlins, assistant United States district attorney, and consent of Mr. F. E. Thompson, of counsel for defendant, ordered that this cause be continued until March 3, 1908, at 10 o'clock a. m., to be set for trial.

37 [From minutes of the United States District Court, vol. 5, page 159, Tuesday, March 3rd, 1908.]

#### Title of Court and Cause.

The court on this day, upon motion of Mr. F. E. Thompson, of counsel for defendant, and consent of Mr. W. T. Rawlins, assistant United States district attorney, ordered that this cause be continued until the April, 1908, term of court. The defendant herein being present in open court.

38 [From minutes of the United States District Court, vol. 6, page 7, Monday, April 13, 1908.]

Title of Court and Cause.

On this day came Mr. Robert W. Breckons, United States district attorney, and said defendant in person, and this cause was called to be set for trial. And thereupon, counsel for defendant not being present, it was by the court ordered, upon motion of said United States district attorney, that this cause be continued until April 14, 1908, at 10 o'clock a. m., to be set for trial, and it was further ordered that the clerk notify counsel for defendant, in writing, of the action taken by the court herein.

39 [From minutes of the United States District Court, vol. 6, page 11, Tuesday, April 14th, 1908.]

Title of Court and Cause.

On this day came Mr. W. T. Rawlins, assistant United States district attorney, and said defendant in person, and Mr. F. E. Thompson, of counsel for defendant, and this cause was called to be set for trial. And thereupon, on motion of counsel for defendant and consent of said assistant United States district attorney, it was by the court ordered that this cause be set for trial for May 18th, 1908, at 10 o'clock a. m.

40 [From minutes of the United States District Court, vol. 6, page 52, Monday, May 18th, 1908.]

Title of Court and Cause.

On this day came Mr. Robert W. Breckons, United States district attorney, and said defendant in person and with his counsel, Mr. Frank E. Thompson, and this cause was called for trial. And thereupon, on motion of counsel for defendant and consent of said United States district attorney, it was by the court ordered that this cause be continued for trial until the October, 1908, term of court.

41 [From minutes of the United States District Court, vol. 6, page 162, Monday, October 12th, 1908.]

Title of Court and Cause.

On this day came Mr. Robert W. Breckons, United States district attorney, and moved the court that this cause, heretofore continued for trial until the October, 1908, term, be continued until October 19th, 1908, at 10 o'clock a. m., which motion the court granted and it was so ordered.

- 42 [From minutes of the United States District Court, vol. 6, page 170, Monday, October 19th, 1908.]

Title of Court and Cause.

On this day came Mr. W. T. Rawlins, assistant United States district attorney, and said defendant in person, with his counsel, Mr. Frank E. Thompson, and this cause came on regularly for trial. Thereupon on motion of the assistant United States district attorney, same being agreeable to counsel for defendant, the court ordered this cause continued for trial until October 22nd, 1908, at 10 o'clock a. m.

- 43 [Minutes of the United States District Court, vol. 6, page 178, Thursday, October 22nd, 1908.]

Title of Court and Cause.

On this day came Mr. Robert W. Breckons, United States district attorney, and Mr. W. T. Rawlins, assistant United States district attorney, and said defendant, John Wynne, in person, and with his counsel, Mr. Frank E. Thompson, and this cause came on regularly for trial. Thereupon the assistant United States district attorney made a motion that Mr. W. L. Whitney be entered as associate counsel, assisting the prosecution. Thereupon Mr. Frank E. Thompson, for said defendant, objected. The court allowed said motion, to which ruling Mr. Frank E. Thompson noted an exception. The question of confining the jury in this cause coming before the court, Mr. Robert W. Breckons, United States district attorney, said that the jury in this cause should be locked up; that they should be confined. Mr. Frank E. Thompson, in reply thereto, stated that he, on behalf of said defendant, was willing that the jury in this cause should be enlarged, and furthermore, that he would file a waiver therefor. Thereupon the court allowed the enlargement of said jury in this cause. This cause then proceeded with the impaneling of a jury. Thereupon came the following named qualified jurors, to wit: George F. Winter, John Lucas, R. C. Scott, H. F. Wichman, Jacob Lando, Samuel Parker, jr., Clement Smith, L. C. Ables, Brainard H. Smith, J. W. A. Redhouse, Robert W. Atkinson, M. W. Bergau, Donald M. Ross, C. H. Bellina, St. C. Sayres, Chas. E. Frasher, J. P. Cooke, R. W. Podmore, R. W. Shingle, A. D.

- 44 Scroggy, John D. Holt, Samuel K. Nainoa, William Smithers, James H. Cummings, who were duly sworn to answer questions as to their competency. The following named jurors were challenged and excused for cause, to wit: Clement Smith, L. C. Ables, C. H. Bellina, R. W. Podmore, William Smithers. The following named jurors were challenged peremptorily by the prosecution, to wit: Brainard H. Smith, J. W. A. Redhouse. And thereupon the following named jurors were challenged perem'torily by the defense, to wit: George F. Winter, H. F. Wichman, J. P. Cooke, Donald M. Ross, Jacob Lando, Robert W. Atkinson. The hour for adjournment

having arrived, this cause was continued until Friday, October 23rd, 1908, at 9:30 a. m.

45 [From minutes of the United States District Court, vol. 6, page 181, Friday, October 23rd, 1908.]

#### Title of Court and Cause.

On this day came Mr. W. T. Rawlins, the assistant United States district attorney, and said defendant, John Wynne, in person, with his counsel, Mr. Frank E. Thompson, and this cause came on regularly for trial. Thereupon this cause was proceeded with by the further impaneling of a jury in the cause herein. And thereupon came the following named qualified jurors, to wit: Arthur L. Greenwell, John Herd, A. C. Rodrigues, Henry P. Roth, Sam Kauhane, Anthony M. Gilman, W. T. Balding, James Sakuma, Jules Carvalho, C. T. Rodgers, Benjamin H. Clarke, Bertram von Damm, David C. Kamauoha, R. C. Searle, John D. Detor, Augusts H. R. Vieirra, Robert W. Sharpe, Chas. J. Campbell, James D. Campbell, who were duly sworn to answer questions as to their competency. The following named jurors were challenged and excused for cause, to wit: Arthur L. Greenwell, John Herd, A. C. Rodrigues, Sam Kauhane, W. T. Balding, James Sakuma, Jules Carvalho, Chas. Brede. The following named jurors were challenged peremptorily by the prosecution, to wit: Anthony M. Gilman, David C. Kamauoha, Samuel K. Nainoa. The following named jurors were challenged peremptorily by the defense, to wit: John D. Holt, R. W. Shingle, St. C. Sayres, R. C. Scott, C. T. Rodgers, Chas. E. Frasher, R. C. Searle, Chas. J. Campbell. Thereupon Mr. Frank E. Thompson, counsel for said

46 defendant, John Wynne, stated that the jury as it stood was satisfactory to the defendant, viz: John Lucas, Samuel Parker, jr., M. W. Bergau, A. D. Scroggy, Henry P. Roth, Benjamin H. Clark, Bertram von Damm, John D. Detor, Augusts H. R. Vieirra, Robert W. Sharpe, Jas. D. Kennedy, J. H. Cummins, but asked that they be not sworn until Monday, October 26th, 1908, at 10 o'clock a. m. The hour for adjournment having arrived, the jury in this cause was excused by the court until Monday, October 26th, 1908, at 10 o'clock a. m.

47 [From minutes of the United States District court, vol. 6, page 185, Monday, October 26, 1908.]

#### Title of Court and Cause.

On this day came the United States, by its assistant district attorney, Mr. W. T. Rawlins, and Mr. W. L. Whitney, associate counsel for the prosecution, and said defendant in person, with his counsel, Messrs. Thompson & Clemons. Thereupon this cause came on regularly for trial. The following named jurors heretofore sworn to try the issues in this cause were present, namely: John Lucas, M. W.

Bergau, Henry P. Roth, John D. Detor, Samuel Parker, jr., James H. Cummings, Benjamin H. Clarke, Augusts H. R. Vieira, A. D. Scroggy, Robert W. Sharpe, Bertram von Damm, James D. Kennedy.

And thereupon counsel for defendant made a formal motion that the jurors herein be enlarged, which motion was allowed by the court. Mr. W. T. Rawlins proceeded to read the indictment herein to the jury, and thereupon Mr. Thompson, of counsel for defendant, objected to the reading of said indictment as a whole; his motion to elect upon which counts of said indictment the prosecution would proceed to trial having been heretofore granted, the court sustained the objection and ruled that the first two counts of said indictment should not be read. Mr. Rawlins then read the remaining counts of the indictment and made his opening statement to the jury. James Reed, a witness for the United States, was called, sworn, and testified. Thereupon the hour for adjournment having arrived, the further trial of this cause was ordered continued to Tuesday, October 27, 1908, at 10 o'clock a. m.

48 [From minutes of the United States District Court, vol. 6, page 186, Tuesday, October 27, 1908.]

#### Title of Court and Cause.

On this day came the United States, by its assistant district attorney, Mr. W. T. Rawlins, and Mr. W. L. Whitney, associate counsel for the prosecution, and said defendant in person, represented by his attorneys, Messrs. Thompson & Clemons, and all of the jurors heretofore impaneled and sworn herein being present, this cause came on regularly for trial. And thereupon the trial of said cause was proceeded with by the introduction of evidence on behalf of the United States. The following named witness, James Reed, heretofore sworn, was called and testified on behalf of the prosecution, at the conclusion of which Dr. J. T. McDonald and G. M. Bright were called, sworn, and testified on behalf of the United States. And thereupon the jury were excused until 2 p. m. of this day. And thereafter and at said time came said defendant, respective counsel and the jury herein, and the trial of said cause was proceeded with by the further testimony of G. M. Bright. Thereupon the following named witnesses: L. Visser, Frank Cocker, and Henry Espinda, were called, sworn, and testified in behalf of the United States. The hour for adjournment having arrived, it was by the court ordered that said cause be continued for further trial to Wednesday, October 28, 1908, at 10 o'clock a. m.

49 [From minutes of the United States District Court, vol. 6, page 187, Wednesday, October 28, 1908.]

#### Title of Court and Cause.

On this day came the United States, by its district attorney, Mr. R. W. Breckons, and Mr. W. L. Whitney, associate counsel for the

prosecution, and said defendant in person, with his counsel, Mr. F. E. Thompson, of the firm of Thompson & Clemons, and all of the jurors heretofore impaneled and sworn herein being present, this cause was called for further trial. Thereupon on motion of Robert W. Breckons, esq., and consent of counsel for defendant, it was ordered by the court that said cause be continued for trial until Thursday, October 29th, 1908, at 10 o'clock a. m.

50 [From minutes of the United States District Court, vol. 6, page 188, Thursday, October 29, 1908.]

#### Title of Court and Cause.

On this day came the United States, by its district attorney, Mr. Robert W. Breckons, and Mr. W. L. Whitney, associate counsel for the prosecution, and said defendant in person, with his counsel, Mr. Frank Thompson, of the firm of Thompson & Clemons, and this cause came on regularly for further trial. On motion of said district attorney, and consent of counsel for defendant, this cause was ordered continued for trial to Friday, October 30, 1908, at 10 o'clock a. m.

51 [From minutes of the United States District Court, vol. 6, page 189, Friday, October 30, 1908.]

#### Title of Court and Cause.

On this day came the United States, by its assistant district attorney, Mr. W. T. Rawlins, and Mr. W. L. Whitney, associate counsel for the prosecution, and said defendant in person, with his counsel, Messrs. Thompson & Clemons, and all of the jurors heretofore impaneled and sworn herein being present, the further trial of this cause is proceeded with. Mr. C. Hopkins was sworn to act as the duly qualified Hawaiian interpreter, and thereupon the further testimony of Henry Espinda was had. The following named witnesses were called, sworn, and testified in behalf of the prosecution; Hart Kawaauhau and Stephen Parker; at the conclusion of which a recess was taken until 2 p. m., of this day, at which time came the following named witnesses, W. L. Whitney, L. B. Reeves, W. P. Jarrett. E. R. Hendry, David Kaahanui, and Louis Aylett, who were called, sworn, and testified on behalf of the United States. The hour for adjournment having arrived, the further trial of this cause was ordered continued to Monday, November 2nd, 1908, at 10 o'clock a. m.

52 [From minutes of the United States District Court, vol. 6, page 192, Monday, November 2, 1908.]

#### Title of Court and Cause.

On this day came the United States by its assistant district attorney, Mr. W. T. Rawlins, and Mr. W. L. Whitney, associate counsel for the prosecution, and said defendant in person represented by his



counsel, Messrs. Thompson & Clemons, and the jurors heretofore impaneled and sworn herein being present, the trial of this cause is proceeded with by the further introduction of evidence in behalf of the prosecution. The following named witnesses were called, sworn, and testified in behalf of the United States: E. B. Friel, Sam. K. Koloa, John Mana, Chas. Madeson, and Wm. Stahl, at the conclusion of which a recess was taken until 2 p. m. of this day. And thereafter and at said time the following named witnesses were called, sworn, and testified in behalf of the prosecution: Christian Husar and Gus Holmes. Thereupon the jury were excused until Wednesday, November 4th, 1908, at 10 o'clock a. m. This cause was continued for argument on admission of certain evidence until Tuesday, November 3rd, 1908, at 10 o'clock a. m.

53 [From minutes of the United States District Court, vol. 6, page 193, Tuesday, November 3, 1908.]

#### Title of Court and Cause.

On this day came Mr. W. T. Rawlins, assistant district attorney, and Mr. W. L. Whitney, associate counsel for the prosecution, and said defendant in person with his attorneys, Messrs. Thompson & Clemons, and this cause was called for argument as to the admission of a certain document, entitled "Copy certificate of enrollment," and thereupon, after due hearing, the court stated that it would rule upon the same on Wednesday, November 4th, 1908, at 10 o'clock a. m.

54 [From minutes of the United States District Court, vol. 6, page 194, Wednesday, November 4, 1908.]

#### Title of Court and Cause.

On this day came the United States by its assistant district attorney, Mr. W. T. Rawlins, and Mr. W. L. Whitney, associate counsel for the prosecution, and said defendant in person with his counsel, Messrs. Thompson & Clemons, and all of the jurors heretofore impaneled and sworn being present, this cause came on for further trial. The court at this time ruled on the admission in evidence of a certain document, entitled "Copy certificate of enrollment," allowing the same to be admitted in evidence by the prosecution. The following named witness, Gus Holmes, was continued and gave further testimony on behalf of the United States, at the conclusion of which, the hour for adjournment having arrived, this cause was ordered continued until Thursday, November 5, 1908, at 10 o'clock a. m.

55 [From minutes of the United States District Court, vol. 6, page 195, Thursday, November 5, 1908.]

#### Title of Court and Cause.

On this day came the United States, by its assistant district attorney, Mr. W. T. Rawlins, and Mr. W. L. Whitney, associate counsel



for the prosecution, and said defendant in person with his attorneys, Messrs. Thompson & Clemons, and all of the jurors heretofore impaneled and sworn herein being present, the further trial of said cause is proceeded with as follows: Mr. W. T. Rawlins stated that the prosecution here rested its case in chief. Whereupon J. J. McDonald, a witness in behalf of the defense, was called, sworn, and testified, at the conclusion of which the defense rested its case. Thereupon the court ordered that all of the jurors herein be excused from further service until Monday, November 9, 1908. This cause was ordered continued for argument, on instructions, to Friday, November 6, 1908, at 10 o'clock a. m.

56 [From minutes of the United States District Court, vol. 6, page 196, Friday, November 6, 1908.]

#### Title of Court and Cause.

On this day came the United States, by its assistant district attorney, Mr. W. T. Rawlins, and Mr. W. L. Whitney, associate counsel for the prosecution, and said defendant in person with his counsel, Messrs. Thompson & Clemons, and this cause was called for argument on instructions. Argument was heard by respective counsel representing the prosecution and in behalf of the defense, at the conclusion of which a recess was taken until 2 p. m. of this day. And thereafter and at said time further argument was had, and the hour for adjournment having arrived, this cause was ordered continued for further argument on instructions until Saturday, November 7, 1908, at 10 o'clock a. m.

57 [From minutes of the United States District Court, vol. 6, page 198, Saturday, November 7, 1908.]

#### Title of Court and Cause.

On this day came the United States, by its assistant district attorney, and Mr. W. L. Whitney, associate counsel for the prosecution, and said defendant in person with his counsel, Messrs. Thompson & Clemons, and this cause is called for argument on instructions for the defense, and after due hearing, the hour for adjournment having arrived, this cause was ordered continued to Monday, November 9, 1908, at 10 o'clock a. m.

58 [From minutes of the United States District Court, vol. 6, page 199, Monday, November 9, 1908.]

#### Title of Court and Cause.

On this day came the United States, by its assistant district attorney, Mr. W. T. Rawlins, and Mr. W. L. Whitney, associate counsel for the prosecution, and said defendant in person with his counsel, Messrs. Thompson & Clemons, and all of the jurors heretofore impaneled and sworn herein being present, the further trial of this

cause is continued as follows: Mr. Thompson made a motion for a directed verdict, which motion was denied by the court. Whereupon Mr. Thompson presented to the court his instructions on behalf of the defense. Mr. Rawlins commenced his argument to the jury, at the conclusion of which Mr. Thompson began his argument, after which a recess was taken until 1.30 p. m., at which time closing arguments were made by respective counsel, and the cause submitted to the jury. Thereupon the court duly charged the jury, and it retired under charge of the sworn officers to consider its verdict. And thereafter and at the hour of 4.30 p. m. of the same day the jury came into court and returned the following verdict, to wit: "In the District Court of the United States in and for the District of Hawaii. The United States of America, plaintiff, vs. John Wynne, defendant. Verdict. We, the jury in the above entitled cause, duly impaneled and sworn, do find the defendant, John Wynne, guilty of murder in manner and form as charged in the indictment herein. (Sgd.) John Lucas, foreman." Mr. Thompson, of counsel for defendant, noted an exception to said verdict, which was allowed by the court. The court thereupon ordered the members of the jury herein discharged and excused from further service until Tuesday, November 10, 1908, at 10 o'clock a. m.

59 United States District Court for the Territory of Hawaii.

UNITED STATES OF AMERICA }  
                                  *versus* }  
JOHN WYNNE, DEFENDANT. }

*Motion for directed verdict.*

Comes now the defendant, John Wynne, in his own proper person and moves for a directed verdict on the grounds following, to wit:

1. That this court is without jurisdiction to try the defendant for any act set forth in the indictment herein.

2. That there is no evidence or proof herein that the act or acts charged against the defendant in said indictment was or were committed on the "high seas."

3. That the evidence herein is only that the act or acts charged in said indictment against the defendant was or were committed on a vessel moored at and tied to a wharf in the harbor of Honolulu, and not on the "high sea" or "high seas."

4. That there is no evidence or proof herein that the ship "Rosecrans" named in said indictment was, at the time of the act or acts charged, an American vessel.

5. That there is no evidence or proof herein of the nationality of said vessel.

6. That there is no proof or evidence, or anything to show, that the act or acts charged against the defendant were committed outside of any State, as State is defined by or known to the law.

7. That the proof or evidence shows that the act or acts here charged were committed in the Territory of Hawaii and within  
60 a State, as the term "State" is known to the law.

8. That the statute upon which the indictment herein is predicated, to wit, Revised Statutes of the United States, section 5339, is unconstitutional and void.

(Sgd) JOHN WYNNE,  
*Defendant above named.*

HONOLULU, HAWAII, November 9, 1908.

(Endorsed:) Title of court and cause. Defendant's motion for directed verdict. Filed Nov. 9, 1908. Frank L. Hatch, clerk. By (sgd) A. E. Murphy, deputy clerk.

61 In the District Court of the United States in and for the District and Territory of Hawaii.

THE UNITED STATES OF AMERICA, PLAINTIFF, }  
vs.  
JOHN WYNNE, DEFENDANT. }

*Proposed instructions to the jury on behalf of the Government.*

62

No. 1.

GENTLEMEN OF THE JURY:

The prisoner is indicted for the murder of Archibald F. McKinnon. It is incumbent upon the Government to prove beyond a reasonable doubt the truth of every fact in the indictment necessary in point of law to constitute the offense. These facts need not be proved beyond a possible doubt, but a moral conviction must be produced in your minds so as to enable you to say that on your conscience you do verily believe their truth. These facts are in part controverted and in part are not controverted, and it will be useful to separate the one from the other. That there was an unlawful killing of Archibald F. McKinnon, the person mentioned in the indictment, by means substantially the same as are therein described; that the mortal wound within a short time produced death; that this wound was given on board the S. S. "Rosecrans," a registered vessel of the United States belonging to the National Oil and Transportation Company; that McKinnon was the third assistant engineer, and the prisoner an oiler on board of that vessel at the time of the occurrence; that the vessel at the time was in the harbor of Honolulu; and that the prisoner was first brought into this district after the commission of the alleged offense, do not appear to be denied and the evidence is certainly sufficient to warrant you in finding all these facts. They are testified to by all of the witnesses.

**GENTLEMEN OF THE JURY :**

An act of Congress confers upon the jury the right, when an accused is found guilty of the crime of murder, to add to its verdict the words, "without capital punishment."

The right to qualify a verdict of guilty by adding the words "without capital punishment" is thus conferred upon the jury in all cases of murder. The act does not itself prescribe, nor authorize the court to prescribe, any rule defining or circumscribing the exercise of this right, but commits the whole matter of its exercise to the judgment and the consciences of the jury. The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court, or the jury, is of opinion that there are palliating or mitigating circumstances. But it extends to every case in which, upon a view of the whole evidence, the jury is of opinion that it would not be just or wise to impose capital punishment. How far considerations of age, sex, ignorance, illness, or intoxication, of human passion or weakness, of sympathy or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, is committed by the act of Congress to the sound discretion of the jury, and of the jury alone.

**GENTLEMEN OF THE JURY :**

Upon the question of intoxication you are instructed that the recent use of intoxicating liquor would not be a defense in this case, and you are to take the evidence as a whole, not by piecemeal, but all the evidence introduced in this case upon both sides, and it is legitimate for you to consider the evidence above referred to in determining the question of whether or not John Wynne was insane at the time the homicide was committed, or whether he was impelled and caused to perform the act by reason of the intoxicating liquor he had drunk, if any. What is intended for you to understand is this: If the evidence as a whole fails to show, beyond a reasonable doubt, that John Wynne was of sound brain, or at least to that extent that he knew right from wrong, and was capable of forming and carrying into execution a criminal intent, he would be entitled to be acquitted, no matter what amount of intoxicating liquor he had drunk; but, in arriving at that conclusion the jury are to look to all the evidence, and if, from all the evidence, they are satisfied that he slew McKinnon by reason of the intoxicating liquor he had drunk, and not as a result of an insane delusion above referred to, in that event it would be your duty to convict the defendant; but if you have a reasonable doubt with regard to this matter, you will resolve it in favor of the defendant and acquit him.

65

## No. 4.

## GENTLEMEN OF THE JURY:

In order to hold the defendant criminally responsible for taking the life of Archibald F. McKinnon, it is only necessary that the jury be satisfied from all of the evidence, beyond a reasonable doubt, that he had sufficient mental capacity to distinguish between right and wrong as to the particular act with which he so stands charged. Excitement or frenzy arising from the passion of anger, hatred, or revenge, no matter how furious, if not the result of a diseased mind, is not legal insanity, and the jury should not confound excitement, anger, or wrath, or acts done or committed in either or both, or in revenge, with actual insanity—insanity recognized by law—because it is only legal insanity, a disease of the brain rendering a person incapable of distinguishing between right and wrong with respect to the offense charged, that excuses the commission of such act. The doing of such act is frenzy, hatred, or revenge, or by reason of some irresistible impulse to avenge some former wrong or grudge does not excuse.

## No. 5.

## GENTLEMEN OF THE JURY:

The court instructs the jury that drunkenness or voluntary intoxication is no excuse for crime, although such drunkenness may be the result of long continued and habitual drinking without any purpose to commit crime, and may have produced a temporary insanity, during the existence of which the criminal act is committed; in other words, a person, whether he be an habitual drinker or not, can not voluntarily make himself so drunk as to become on that account irresponsible for his conduct during such drunkenness.

66

## No. 6.

## GENTLEMEN OF THE JURY:

The court instructs the jury that although they may believe from the evidence that the defendant at the time of the killing of Archibald F. McKinnon was without sufficient power to govern his action by reason of some impulse which he could not resist or control; yet if they further believe from the evidence that such lack of reason to know right from wrong or such insufficient will power to govern his actions or to control his impulses arose alone from voluntary drunkenness, but not from unsoundness of mind, they could not acquit the defendant on the grounds of insanity.

## No. 7.

## GENTLEMEN OF THE JURY:

If from all the evidence in the case, you believe beyond a reasonable doubt, that the defendant committed the crime of which he is accused, in manner and form as charged in the indictment, and that

at the time of the commission of such crime the defendant knew that it was wrong to commit such crime, and was mentally capable either to do or not to do the act or acts constituting such crime, and of governing his conduct in accordance with such choice, then it is your duty, under the law, to find him guilty, even though you should believe, from the evidence, that at the time of the commission of the crime he was not entirely and perfectly sane, or that he was greatly excited or enraged, or under the influence of intoxicating liquor.

67

No. 8.

GENTLEMEN OF THE JURY:

The court instructs you, that you should bear in mind that under the law voluntary drunkenness is no excuse for the perpetration of crime, and that where without intoxication the law would impute a criminal intent, mere proof of drunkenness will not avail to disprove such intent, and that it is only in cases where the constant and excessive use of intoxicating stimulants has produced actual insanity, resulting in derangement of the mental and moral faculties to such an extent as to render the person so inflicted incapable of distinguishing right from wrong, that crime may be excused thereby. *State v. Williams*, 122 Iowa, 115; 97 N. W., 992 (995).

No. 9.

GENTLEMEN OF THE JURY:

I instruct you, gentlemen of the jury, that it is immaterial in this case whether the defendant was drinking or intoxicated at the time of the homicide spoken of in the evidence, as drunkenness neither excuses, palliates, nor affects a crime. *States v. May*, 172 Mo., 630; 72 S. W., 918 (920).

68

No. 10.

GENTLEMEN OF THE JURY:

The law presumes that every sane person contemplates and intends the natural, ordinary, and usual consequences of his own voluntary acts, unless the contrary appears from the evidence; and if a man is shown by the evidence beyond a reasonable doubt to have killed another by any act, the natural and ordinary consequences of which would be to produce death, then it will be presumed that the death of the deceased was designed by the slayer unless the facts and circumstances of the killing or the evidence creates a reasonable doubt whether the killing was done purposely. *Archer v. State*, 64 Ind., 56.

No. 11.

GENTLEMEN OF THE JURY:

The rule which clothes every person accused of crime with the presumption of innocence and imposes upon the prosecution the bur-

den of establishing his guilt beyond a reasonable doubt is not intended to aid any one who is in fact guilty of crime to escape, but is a humane provision of law intended so far as human agencies can to guard against the danger of any innocent person being unjustly punished.

69

No. 12.

## GENTLEMEN OF THE JURY:

The court therefore instructs the jury as a matter of law that the doubt which the juror is allowed to retain on his own mind and under the influence of which he should frame a verdict of not guilty must always be a reasonable one. A doubt produced by undue sensibility in the minds of any juror in view of the consequences of his verdict is not a reasonable doubt, and a juror is not allowed to create sources or materials or doubt by resorting to trivial and fanciful suppositions and remote conjectures as to possible state of facts differing from that established by the evidence; you are not at liberty to disbelieve as jurors if you believe as men. Your oath imposes upon you no obligations to doubt where no doubt would exist if no oath had been administered. A juror violates the oath administered to him if, when convinced beyond a reasonable doubt, as defined in these instructions, of the guilt of a defendant, he returns a verdict of "Not guilty" on account of the consequences and punishment which might be attached to a verdict of "Guilty."

70

No. 13.

## GENTLEMEN OF THE JURY:

There is always a motive for every human act that is done by an individual who is sane, but sometimes it is undiscoverable; sometimes it cannot be fathomed; sometimes because of its utter insignificant nature compared with a great offense of that kind, honest men, whose minds and hearts have not been corroded by the commission of crime, overlook it, they pass it by. The law does not require impossibilities. The law recognizes that the cause of the killing is so hidden in the mind and breast of the party who killed that it cannot be fathomed, and it does not require impossibilities, it does not require the jury to find it. Yet, if they do find it, it simply becomes an item of evidence in the case, which is only evidenciary at best—that is, it is only an item of evidence going to show whether a particular party may have committed an act, and sometimes going to show the characteristics of that act; the law says, however, that wherever motive can be found, though it is not required to be found, it is the duty of the jury to find it, though when they do find it they are not to expect that it will ever be adequate; that it will be in proportion to the act done, because there is nothing on this earth that is in proportion to the crime of willfully and deliberately taking human life; there is no motive ade-



quate to it; there is nothing that can be weighed upon the one side of the scale with the crime of deliberate and wicked murder upon the other side of it, and be pronounced by honest men as equal in weight to the crime committed. The law says that motive need not be proportionate to the heinousness of the crime. *Pointer vs. The United States*, 151 U. S. 416; 38 *Lawyer's Ed.*, 211.

71

No. 14.

## GENTLEMEN OF THE JURY:

The act under which the defendant is indicted does not define the crime itself, or establish any degree of turpitude in the offense, as does the laws of this Territory. There is no such designation made in the law of the United States as murder in the first degree, or murder in the second or any other degree. The statute simply enacts that if any person on the high seas, or in any arm of the sea, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State of the United States, shall commit the wilful crime of murder, such person shall, upon conviction thereof, suffer death. We must therefore resort to the common law for a definition of the crime. In the absence of statutory provisions, the federal courts are obliged to resort to that law for guidance in the construction of legal terms and phrases. By that law murder is defined to be the wilful killing of a human being, in the peace of the country, with malice aforethought, either express or implied. The term malice is here used in a technical sense, and includes not merely hatred and revenge, but every bad unjustifiable motive. Express malice exists when one, with deliberate premeditation and design, formed in advance, kills another, such premeditation and design being manifested by external circumstances capable of proof, such as lying in wait, antecedent threats and concerted schemes to do the party bodily harm.

Malice is implied by the law from any deliberate and cruel act committed by one person against another. Thus, it is implied when one man kills another without provocation, or where the provocation is not great; for no person except one of abandoned heart can be guilty of such an act without a cause or upon any slight cause. The terms express and implied malice in truth indicate the same state of mind, but they are established in different ways; the one by circumstances showing premeditation of the homicide and the other being inferred only from the act committed.

72

No. 15.

## GENTLEMEN OF THE JURY:

The term "malice" as used in these instructions is used in a technical sense and includes not merely hatred and revenge, but every bad and unjustifiable motive.

Express malice exists when one with deliberate premeditation and design formed in advance kills another, such premeditation and de-



sign being manifested by external circumstances capable of proof, such as lying wait, antecedent threats, and concerted schemes to do the party bodily harm.

Malice is implied by the law from any deliberate and cruel act committed by one person against another. Thus it is implied when one man kills another without provocation, or where the provocation is not great; for no person, except one of abandoned heart can be guilty of such an act without a cause or upon any slight cause.

The terms "express" and "implied" malice in truth indicate the same state of mind, but they are established in different ways; the one by circumstances showing premeditation of the homicide and the other being inferred from the act committed.

73

No. 16.

GENTLEMEN OF THE JURY:

It is essential to the crime of murder that the killing should be from what the law denominates malice aforethought, and the Government must prove this allegation; but it is not necessary to offer previous threats or preparations to kill. These things, if proved, would be evidences of malice, and proof of this kind is one of the means of sustaining the allegations of malice. But besides this direct evidence of what is called in the law express malice, malice may also be inferred or implied from the nature of the act of the accused. If a person, without such provocation as the law deems sufficient to produce the crime of manslaughter, intentionally inflicts, with a dangerous weapon, a blow calculated to produce, and actually producing death, the law deems the act malicious, and the offense is murder. The law considers that the party meant to effect what was the natural consequence of his act; that if the natural consequences of his act was death, he meant to kill; and if he so intended, in the absence of such provocation as the law considers sufficient to account for that intent, from the infirmity of human passion, then it is to be inferred that malice existed, and from that feeling the act was done. In other words, the intention to kill unlawfully and without sufficient provocation is a malicious intention, and if the intent is executed the killing is in law malice aforethought, and is murder.

74

No. 17.

GENTLEMEN OF THE JURY:

Malice is implied in every case of intentional homicide; that is to say, when once it is established that a person was intentionally killed, the law implies malice in the party who caused the death. If there are circumstances or excuse or palliation which will rebut the implication of malice, it is incumbent upon him to show that. The burden of proof rests upon him; for the law presumes that every person intends to produce the results which are the consequence of his acts. A man cannot strike another with a bar of iron without inflicting

bodily pain; therefore, if he does so strike another the law presumes that he intends thus to inflict pain. The usual effect of a leaden ball fired from a loaded pistol of a common size at a distance of a few feet only, striking the head or back of a person, is to kill such person; the law presumes that any one who fires a loaded pistol within a few feet of the person, intends to kill; it therefore implies malice in him. The usual effect of a two or three pound machinist's hammer being driven into and through the skull immediately under and about the temple and into the right eye and fracturing and crushing the bones of the skull is to inflict death; the law therefore presumes that everyone who uses a hammer on a human being in a manner to cause such injuries intends to kill, and it implies malice in him.

75

No. 18.

## GENTLEMEN OF THE JURY:

To constitute the crime of murder, it is not necessary that the slayer should have a particular enmity or malevolence against the deceased. It is sufficient if there be either a deliberate malice in the act or circumstances of cruelty and malignity carrying in them the plain indications of a depraved, wicked, and malignant spirit.

No. 19.

## GENTLEMEN OF THE JURY:

The law says we have no power to ascertain the certain condition of a man's mind. The best we can do is to infer it more or less satisfactorily from his acts. A person is presumed to intend what he does. A man who performs an act which it is known will produce a particular result is from our common experience presumed to have anticipated that result and to have intended it. Therefore we have a right to say, and the law says, that when a homicide is committed by weapons indicating design, that it is not necessary to prove that such design existed for any definite period before the fatal blow was fired. From the very fact of a blow being struck, from the very fact that a fatal bullet was fired we have the right to infer as a presumption of fact that the blow was intended prior to the striking, although at a period of time inappreciably distant.

76

No. 20.

## GENTLEMEN OF THE JURY:

If you believe from the evidence that the confessions or admissions testified to by the witnesses as having been made to them by the defendant were so made, and that they were the spontaneous and voluntary acts of the defendant, and if you further believe that such admissions and confessions have been corroborated by proof that the said Archibald F. McKinnon was murdered, and that the defendant was so situated that he had an opportunity to commit the crime, then

such confessions and admissions may be entitled to great weight in your minds; and if you believe from all the evidence beyond a reasonable doubt that the defendant is guilty, then you should so find by your verdict.

77 In the United States District Court for the District of the Territory of Hawaii.

UNITED STATES OF AMERICA }  
*vs.*  
 JOHN WYNNE. }

*Defendant's requested instructions.*

Comes now the defendant herein and requests the court to instruct the jury as follows:

78

No. 1.

You cannot convict this defendant upon evidence merely showing a possible opportunity for the commission of the alleged offense, if there be any evidence before you, nor can you convict this defendant upon surmises, speculations, and conjectures, nor can you convict this defendant upon suspicion, no matter how strong. In all criminal cases the proof inculcating the accused should be of a degree of certainty transcending mere possibility, or probability, mere surmises and conjectures, and transcending strong suspicion. The evidence in a criminal case may, let it be assumed, create a strong suspicion, or it may create a strong probability that the defendant's complicity in the alleged crime is established as charged, but I instruct you, in plain terms, that the law, in its wise and human demand for the liberty of a human being, requires more than a strong suspicion or strong probability; it demands that the evidence should lead to a moral certainty of a conclusion of guilt beyond every hypothesis and to the exclusion of all reasonable doubt; less than this will not suffice, and you are therefore charged by me that you will not be justified in finding this defendant guilty upon the grounds that it is more probable that he is guilty, if there are any such grounds, than that he is innocent.

79

No. 2.

You are instructed that the circumstance that this defendant has been complained against and that there is an indictment now on file against him is not evidence against him in any way, shape, or manner, either directly or indirectly, or by any intendment, inference, or presumption. These indictments prove nothing against the defendant; on the contrary, in the face of the indictment the law presumes the defendant to be innocent until he shall have been proved to be guilty beyond a reasonable doubt. You must understand at the outset that

you have no right to draw any inferences or indulge in any presumptions against the defendant merely because the indictment has been filed against him.

No. 3.

During the trial of this case statements have been made by the respective counsel concerning testimony adduced or to be adduced, and in this connection I instruct you that you are to entirely disregard such statements as to testimony to be adduced, and, further, that you are the sole judges of the testimony given, and upon your understanding of it your verdict is to be rendered.

80

No. 4.

The obligation which the law imposes upon the prosecution to establish a criminal intent beyond a reasonable doubt is a general doctrine of our criminal law; it is not to be lost sight of by you in deciding the facts of this case, and, like the presumption of innocence, it applies throughout the whole case. This defendant cannot be convicted by you unless he premeditatedly, feloniously, knowingly, and wilfully, and with criminal intent, did the acts complained of. In determining the presence or absence of this indispensable element you should consider all of the surrounding circumstances, and unless the prosecution has established beyond a reasonable doubt the existence of criminal intent on the part of the defendant, it is your duty to acquit him. And if upon that question there is a reasonable doubt, in your minds, that doubt must be solved by a verdict in favor of the defendant.

81

No. 5.

In order to convict this defendant upon the evidence of circumstances, it is necessary not only that all of the circumstances concur to show that he committed the crime charged, but also that they are inconsistent with any other rational conclusion. It is not intended that a particular hypothesis explain all the phenomena of circumstantial evidence; nothing must be inferred, because, if true, it would account for the facts. Every reasonable hypothesis by which the facts may be explained consistent with innocence must, therefore, be vigorously examined and successfully eliminated, and only that no other supposition would reasonably account for all the conditions in the case can the conclusion of guilt be legitimately adopted. I feel it my duty, in the language of the learned Chief Justice Shaw, to warn you that great care and caution should be exercised by you in drawing inferences from proved facts, because the chief danger to be avoided in dealing with circumstantial evidence arises from the proneness natural to men to jump at conclusions from certain facts without duly averting to other facts which are inconsistent with a hypothesis which the first facts would seem to indicate.

82

## No. 6.

The circumstance that this defendant has not taken the stand in this case is not a circumstance which can be used against him in any way, shape or form. It is the undoubted right of the defendant to remain mute and insist that the Government shall prove the case against him beyond all reasonable doubt, and he is entitled to rest in perfect security upon the plea of not guilty and upon the presumption of innocence with which he is clothed by law and which follows him throughout the entire trial. The defendant in a criminal case is not called upon to make explanations or suggest solutions or clear up ambiguities, either real or imaginary, and I therefore charge you that the circumstance that the defendant has availed himself of his right in this regard is not to be taken against him in any way, shape, or form whatever.

## No. 7.

You are further instructed that if upon the trial of this case a reasonable doubt of any of the facts necessary to convict the accused is raised in the minds of the jury by the evidence itself, or by the ingenuity of counsel, upon any hypothesis reasonably consistent with the evidence, that doubt is in favor of the defendant's acquittal.

83

## No. 8.

I further instruct you that your personal opinions as to facts not proven cannot possibly be considered as a basis of your convictions. You may believe, as men, that certain facts exist, but as jurors you can only act upon evidence introduced at the trial, and from that and that alone you must form your verdict unaided, unassisted, and uninfluenced by any opinion or presumption not formed upon the testimony.

## No. 9.

I instruct you that the law presumes the defendant innocent in this case and not guilty as charged in the indictment, and the presumption should continue and prevail in the minds of the jury until they are satisfied beyond all reasonable doubt of the guilt of the defendant, and acting upon this presumption, the jury should acquit the defendant unless constrained to find him guilty by the evidence convicting him of such guilt beyond all reasonable doubt and that the presumption of innocence is not a mere form to be disregarded by the jury at pleasure, but it is an essential, substantial part of the law of the land and binding upon the jury in this case, the Supreme Court of the United States has held that the presumption of evidence is evidence created by law in favor of the accused; and it is the duty of the jury to give the defendant the full benefit of this presumption

84 of innocence until the proof is adduced which establishes his guilt beyond a reasonable doubt, and whether the proof be direct or circumstantial, it must be such as excludes any rational hypothesis of the innocence of the accused. Guilt of a party is not to be inferred because the facts proved are consistent with his guilt, but they must be inconsistent with innocence.

No. 10.

You are instructed that a reasonable doubt is that state of mind which, after a full comparison and consideration of all the evidence both for the United States and the defense, leaves the minds of the jury in that condition that they cannot say that they feel an abiding faith amounting to moral certainty, from the evidence in the case, that the defendant is guilty of the charge as laid in the indictment. If you have such doubt, if your conviction of the defendant's guilty, as laid in the indictment, does not amount to moral certainty from the evidence, then you must acquit the defendant.

No. 11.

I instruct you that the crime of murder is the unlawful killing of a human being by a person of sound memory and discretion, with malice aforethought, expressed or implied.

85

No. 12.

I instruct you that manslaughter is the unlawful killing of another human being without malice, either express or implied.

No. 13.

I instruct you that malice aforethought is the especial characteristic which distinguishes the crime of murder from other cases of killing a human being; and that malice, or mental condition, marks the boundary which separates the two crimes of murder and manslaughter.

No. 14.

And in this connection I instruct you that a particular or specific intent is absolutely essential to the commission of the crime of murder, and if you find that the deceased met his death at the hands of the defendant, you cannot find the defendant guilty as charged unless you also find that the mind of the defendant was at the time capable of forming this particular or specific intent, and if there is in your minds any reasonable doubt of the defendant's ability at the time to form this particular or specific intent, then you cannot find him guilty of any greater offense than manslaughter.

86

## No. 15.

I instruct you that in order to convict the defendant of any crime under this indictment you must first find beyond all reasonable doubt that he killed the deceased. If you find the fact of killing by defendant, you still cannot find him guilty of murder unless you also find beyond all reasonable doubt that at the time in question the defendant was capable of entertaining that specific intent which is an essential ingredient of the crime.

## No. 16.

I instruct you that the defendant is presumed to be innocent, and that you cannot therefore convict him on negative testimony, for nothing short of a universal negative excluding every possible doubt will overcome the presumption in his favor. The positive testimony of one credible witness on any material matter is entitled to more weight than the testimony of several other witnesses equally credible who testify negatively on the same subject.

## No. 17.

You are instructed that while it is true that every man is presumed at all times to be sane and to be mentally competent, yet whenever by the testimony the question of insanity or of mental capacity or competency is raised, the fact of sanity or of mental capacity or competency must, like any other fact in a criminal case, be established by the prosecution beyond all reasonable doubt.

87

## No. 18.

You are instructed that the burden is upon the Government of proving beyond a reasonable doubt that the defendant was mentally competent at the time of the alleged act; that is, that the defendant was of sufficient mental capacity to understand the nature and quality of his acts and that the particular act alleged was wrong and a violation of the law of the land for which he would be amenable to punishment.

## No. 19.

Under the act of Congress upon which the indictment was returned, it is provided that the punishment for the crime of murder shall be death. But by a later act of Congress, enacted January 15, 1897, and found in the second Supplement to the Revised Statutes at page 538, it is, however, provided that it shall be within the discretion of the jury, in case it should return a verdict of murder against the defendant, to qualify such verdict by adding thereto the words "without capital punishment."



88

No. 20.

I instruct you that if you have any reasonable doubt as to the presence at the time of the act charged of that self-determining, self-controlling power in the defendant which in a sane mind makes it conscious of the real nature of its own purposes and capable of resisting wrong impulses, then you cannot find the defendant guilty of the determine so to kill the deceased, then you cannot find him guilty of manslaughter herein defined.

No. 21.

While voluntary intoxication is no excuse for the commission of a crime, yet if, upon the whole evidence in this case, you shall have a reasonable doubt whether because of intoxication at the time of the killing—if you shall find from the evidence that the accused did kill the deceased and that he was intoxicated at the time—he had sufficient mental capacity to deliberately think upon and rationally determine so to kill the deceased, then you can not find him guilty of murder, although such inability was the result of intoxication.

89

No. 22.

I instruct you that while intoxication is no excuse for crime, if you believe from the evidence that the defendant was intoxicated at the time the crime was committed, it should be considered for the purpose of ascertaining the condition of the mind of the accused in order to determine whether he was capable of entertaining that specific intent which is an essential ingredient of the particular crime with which he is charged, namely, murder, to determine whether under all of the circumstances of the case the defendant is guilty of murder or a less crime to which such essential ingredient is not material.

90

No. 23.

The court instructs you that though the facts of intoxication at the time of the commission of a crime is no excuse or justification therefor, yet when it is essential, as it is in this case essential, to the crime charged in the indictment, that a particular and specific intent be at the time entertained, the fact of intoxication, if you find there was intoxication, should be weighed and considered in determining the capacity of the defendant to entertain such an intent. And in this case, if the jury find from the evidence that the defendant did kill the deceased, and that at the time of the commission of the homicide the defendant was, by reason of intoxication, incapable of entertaining an intent to kill, or if they have any reasonable doubt whether he was at the time in question capable of entertaining such an intent, he cannot be convicted of murder; but if at all, only of some degree of homicide to which such an intent is not material.

91

No. 24.

Gentlemen of the jury, it is provided by the laws of the United States that "in all criminal causes the defendant may be found guilty

of any offense the commission of which is necessarily included in that with which he is charged in the indictment; " and I therefore instruct you that although the indictment charges the defendant with murder still, if there be wanting in the proof against the defendant the elements of malice, intent, or mental capacity, which are necessary to constitute murder as defined by my instructions, then you cannot find the defendant guilty of murder, but you may find him guilty, if at all, only of some degree of homicide to which such malice, intent, or mental capacity is not material.

## No. 25.

I instruct you that in order to find the defendant guilty it must be established by proper evidence, beyond all reasonable doubt, that the offense charged was committed upon the high seas, and that evidence of an offense committed in an arm of the sea, or in a haven or harbor, if there is such evidence, is insufficient.

92

## No. 26.

And in this connection I instruct you that the term "high seas" means the open ocean as distinguished from a river, harbor, port, haven, basin, or bay.

## No. 27.

I instruct you that, in order to find the defendant guilty of any crime of homicide, it is necessary that the act or acts here charged should have been committed outside of any State, which term State includes not only States admitted to the Union of States known as the United States, but it includes also an organized Territory, such as the Territory of Hawaii. I therefore instruct you that unless you find that the act or acts here charged were committed outside of the Territory of Hawaii you cannot find the defendant guilty.

(Sgd) JOHN WYNNE,  
*Defendant above named.*

HONOLULU, HAWAII, November 9th, 1908.

93 In the United States District Court for the Territory of  
Hawaii, October A. D. 1908 term.

THE UNITED STATES OF AMERICA, PLAINTIFF,	} No. 366. Indictment for murder.
<i>vs.</i>	
JOHN WYNNE, DEFENDANT.	

W. T. Rawlins, ass't. U. S. district attorney, and W. L. Whitney, deputy attorney-general for the Territory, for the prosecution.  
Messrs. Thompson & Clemons, attorneys for defendant.

*Charge to the jury.*

## GENTLEMEN OF THE JURY:

The defendant is charged by the grand jury under its indictment with having committed the crime of murder by killing Archibold F. McKinnon by blows with a hammer, in the harbor of Honolulu.

The law under which this indictment is found is section 5339 of the Revised Statutes of the United States, and is as follows; as to the description of this offense: "Every person who commits murder \* \* \* upon the high seas or in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State \* \* \* shall suffer death."

94 An act of Congress confers upon the jury the right, when an accused is found guilty of the crime of murder, to add to its verdict the words, "without capital punishment."

The right to qualify a verdict of guilty by adding the words "without capital punishment" is thus conferred upon the jury in all cases of murder. The act does not itself prescribe, nor authorize the court to prescribe, any rule defining or circumscribing the exercise of this right; but commits the whole matter of its exercise to the judgment and consciences of the jury. The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court, or the jury, is of opinion that there are palliating or mitigating circumstances. But it extends to every case in which, upon a view of the whole evidence, the jury is of opinion that it would not be just or wise to impose capital punishment.

There are no degrees of murder established by the federal laws, but the following statute provides that a homicide as described, but without malice, is manslaughter:

"Every person who, within any of the places or upon any of the waters described in section fifty-three hundred and thirty-nine, unlawfully and wilfully, but without malice, strikes, stabs, wounds, or shoots at, or otherwise injures another, of which striking, stabbing, wounding, shooting, or other injury such other person dies, either on land or sea, within or without the United States, is guilty of the crime of manslaughter." (Sec. 5341, R. S. U. S.)

The rules of evidence and of the conduct of the trial of a case of this kind do not materially differ from those relating to the trial of a minor offense, but as this defendant is charged with murder the case is of great importance to the public, which is represented by the United States as plaintiff, and to the defendant as well. The public interests in a case of murder are based on the interest which all  
95 persons have in the protection of the individual from violence, and especially from the kind of violence which aims to deprive individuals of life, the greatest possession of mankind. The lawless taking of human life cannot be ignored by the public, because if such conduct is allowed without notice and without interference or punishment, other persons of like disposition will feel that there is immunity in the commission of such crimes, and society and the individual would become exposed to a greater extent to such attacks. The case is also, and obviously, of the greatest importance to the defendant in that his life is subject to your decision of the issue.

In considering the evidence which has been produced in this case, you are to remember that you are the sole judges of all questions of

fact, with the right to weigh the evidence, and in doing so to consider the credibility of witnesses, by their manner of testifying, the consistency of their testimony and their means of information and their opportunity of knowing the truth of the information which they give, and any interest they may have in the result of the trial.

The fact that the defendant has been charged with this offense and that there is an indictment against him is not evidence against him in any way. The law presumes one charged with an offense to be innocent until he shall have been proven guilty by competent and sufficient evidence, beyond a reasonable doubt, and in the absence of such evidence against this defendant you must find that he is not guilty.

No one can be found to be guilty of a crime unless the evidence against him establishes his guilt beyond a reasonable doubt.

96 By a reasonable doubt is meant a doubt based on reason, which is not a fanciful nor conjectural doubt, but one which must impart such a condition of mind that after a careful consideration of the evidence you can not say that you are convinced or satisfied that the defendant is guilty as charged; but if, after an impartial comparison and consideration of all the evidence, you can truthfully say that you have an abiding conviction of the defendant's guilt, such a conviction as you would be willing to act upon in important matters relating to your own affairs, you have no reasonable doubt.

The duty rests upon the prosecution to prove the defendant guilty beyond all reasonable doubt by evidence which shall exclude every reasonable hypothesis except the one of guilt.

The prosecution is not bound to directly establish an adequate or any motive for the alleged crime. The criminal act and the connection of the accused with it, if proved beyond a reasonable doubt, furnish sufficient evidence that there was some cause or motive influencing the defendant to the perpetration of the act if he was acting under a mental capacity to commit the crime, as elsewhere explained.

In order to convict this defendant upon the evidence of circumstances, and the admissions of the defendant testified to are in the nature of circumstances, it is necessary, not only that all of the circumstances concur to show that he committed the crime charged but also that they are inconsistent with any other rational conclusion. Only when every reasonable hypothesis by which the facts might be explained consistently with innocence have been carefully examined and found wanting, can the conclusion of guilt be legitimately adopted.

You can not convict this defendant upon evidence merely showing a possible opportunity for the commission of the alleged offense, if there be any such evidence before you, nor can you convict him  
97 upon surmises, speculations, and conjectures, nor can you convict him upon suspicion, no matter how strong. In all criminal cases the proof inculcating the accused should be of a degree of certainty transcending mere possibility, or probability,

mere surmises and conjectures, and transcending strong suspicion. The evidence in a criminal case may, let it be assumed, create a strong suspicion, or it may create a strong probability that the defendant's complicity in the alleged crime is established as charged, but I instruct you that the law, in its wise and humane demand for the life and liberty of a human being, requires more than a strong suspicion or strong probability; it demands that the evidence should lead to a conclusion of guilt beyond every other hypothesis and to the exclusion of all reasonable doubt. Less than this will not suffice, and you are therefore charged that you will not be justified in finding this defendant guilty upon the grounds that it is more probable that he is guilty, if there are any such grounds, than that he is innocent.

I further instruct you that your personal opinions as to facts not proven cannot possibly be considered as a basis of your convictions. You may believe, as men, that certain facts exist, but as jurors you can only act upon evidence introduced at the trial, and from that and that alone you must form your verdict, unaided, unassisted, and uninfluenced by any opinion or presumption not formed upon the testimony.

The circumstance that this defendant has not taken the stand in this case is not a circumstance which can be used against him in any way. It is the undoubted right of the defendant to remain  
98     mute and insist that the Government shall prove the case against him beyond all reasonable doubt, and he is entitled to rest upon his plea of not guilty and upon the presumption of innocence with which he is clothed by law and which follows him until overcome by evidence of his guilt. The defendant in a criminal case is not called upon to make explanations or suggest solutions or clear up ambiguities, either real or imaginary, and I therefore charge you that the circumstance that the defendant has availed himself of his right in this regard is not to be taken against him in any way.

A criminal case involving much testimony and many facts should not be decided upon the probability or improbability of any one point singled out of the evidence, unless the settlement of such point is really decisive of the whole issue; but a safe decision requires due consideration to be given to all the evidence in the case.

You may, in deciding this case, properly exercise your judgment and apply your own knowledge and experience in regard to the general subject of inquiry. In construing and applying testimony you may make reasonable inferences and deductions; it is proper for you to apply to the facts proved your general knowledge as intelligent men; you should test the truth and weight of evidence and what it proves by your knowledge and judgment derived from experience, observation, and reflection; and it is competent for you to use your knowledge of human nature and of the customs of society in your efforts to interpret conduct and judge of its indications, provided, however, your verdict must be based upon a due consideration of all the evidence in the case.

99 The last four counts of the indictment contain the charge in this case, and although it is alleged that the steamship "Rosecrans," on which the homicide is alleged to have occurred, is a vessel of United States register or enrollment, and is owned by American citizens, yet I charge you that these allegations as to ownership and nationality are unnecessary; that under the law any wilful and unlawful killing of a human being, on any vessel of any nationality, lying in the harbor of Honolulu, is murder or manslaughter, as the case may be; and if you find beyond a reasonable doubt that the defendant wilfully and unlawfully struck McKinnon a fatal blow on board such vessel, as alleged, in consequence of which he immediately died on board of such vessel, or if you should find that he survived until after taken ashore and died on shore from the effects of such blow, in either case you would be justified in finding a verdict of guilty of murder or manslaughter according to the evidence as to malice or its absence.

The crime of murder is not defined in the statute and we have to refer to the common law and the decisions of courts therefor, wherein we find that murder is the unlawful killing of any human being by a person of sound memory and discretion, with malice aforethought, express or implied. Malice, in this connection, is an intention to do bodily harm, a formed design to do mischief. It includes premeditation. There must therefore be a period of prior consideration, but as to the duration of such period no limit can be arbitrarily assigned. There is no time so short but that within it the human mind can form a deliberate purpose to do an act, and if the intent to do mischief to another is thus formed, after no matter how short a  
100 period of reflection, it is none the less malice aforethought. The existence or nonexistence of malice is a conclusion to be drawn by the jury from all the facts in the case, and from a careful study of the acts of the defendant and of the circumstances connected with the crime charged. The term malice is here used in a technical sense, and includes not merely hatred and revenge, but every bad, unjustifiable motive. Express malice exists when one, with deliberate premeditation and design, formed in advance, kills another, such premeditation and design being manifested by external circumstances capable of proof, such as lying in wait, antecedent threats and concerted schemes to do the partly bodily harm. Malice is implied by the law from any deliberate and cruel act committed by one person against another. Thus, it is implied when one man kills another without provocation, or where the provocation is not great; for no person except one of abandoned heart can be guilty of such an act without a cause, or upon any slight cause. The terms express and implied malice in truth indicate the same state of mind, but they are established in different ways; the one by circumstances showing premeditation of the homicide, and the other being inferred only from the act committed.

What a man actually does is evidence of his intention as a rule. It is our common experience that where a man performs an act which



will obviously produce a particular result, he has intended the result. Therefore when a homicide is committed by weapons indicating design, it is not necessary to prove that such design existed at any definite period before the fatal blows. There are, however, more or

less other facts and circumstances connected with such conduct  
 101 which may tend to explain it on the theory of an absence of malice or on a theory of actual lawfulness. For instance, circumstances of self-defense which justify homicide. It also sometimes happens in a case of a homicide that there are circumstances of affray in which a man is killed in the course of a quarrel by a blow unconnected with any intention to kill, and so without malice. In such a case the person committing the homicide would be guilty only of manslaughter. There are other circumstances in which a homicide is committed through carelessness or negligence, in which case the inference of malice is explained away and the person committing the homicide is guilty only of manslaughter. But where these and other circumstances which disprove a malicious intent do not exist, then the fact of causing death through the use of a dangerous weapon implies malice and is murder, with the exception that is raised by the defense of insanity or intoxication, where the degree of insanity or intoxication is such that the person committing the homicide is incapable of forming a malicious intent or of harboring a design.

The defense of intoxication is made in this case, and I charge you that it is no defense, excuse, or palliation unless it is shown beyond a reasonable doubt to have reached such a stage at the time of the homicide that the defendant was thereby rendered incapable of harboring a malicious intent or of forming a design or of understanding or remembering the lawless nature of the act of taking human life and that it is forbidden and punishable by law. The homicide must be wilful and intentional in order to warrant a conviction of murder.

Where the defense of intoxication is made to a charge of murder, the burden is upon the Government to establish not  
 102 only all the other essential facts constituting the offense, but to establish also the proposition that the defendant at the time of the homicide was of sound mind; and by this term is not meant that he was of perfectly sound mind, but that he had sufficient mind to know that the act he was committing at the time he was performing it was a wrongful act in violation of human law and that he could be punished therefor, and that he did not perform the act because being of unsound mind he was controlled by irresponsible and uncontrollable impulse, or was incapable of premeditation.

If, from all evidence in the case, you believe beyond a reasonable doubt that the defendant committed the crime of which he is accused, in manner and form as charged in the indictment, and that at the time of the commission of such crime the defendant knew that it was wrong to commit such crime, and was mentally capable either to do or not to do the act or acts constituting such crime, and of governing his conduct in accordance with such choice, then it is your duty under the law to find him guilty of murder, even though you should believe,



from the evidence, that at the time of the commission of the crime he was not entirely and perfectly sane, or that he was greatly excited or enraged, or under the influence of intoxicating liquor.

I instruct you that in order to convict the defendant of any crime under this indictment you must first find beyond all reasonable doubt that he killed the deceased. If you find the fact of killing by de-

103 defendant, you still can not find him guilty of murder unless you also find beyond all reasonable doubt that at the time in question the defendant was capable of entertaining that specific intent which is an essential ingredient of the crime, and for this purpose you should take into consideration the nature and circumstances of the assault, the actions, conduct, and demeanor of the defendant and his declarations both before and after the homicide, and especially whether his mental capacity was sufficient to enable him to entertain the simple intent to kill under the circumstances, or whether his mental faculties were so obscured by intoxication as to have rendered him incapable of entertaining that intent. On the question of intent, it is proper for you to consider the previous declarations of the defendant which may tend to show that he entertained a grudge of some kind against McKinnon upon grounds that may have been real or fanciful, and any declarations that may have been made by him subsequent to the homicide expressing a similar feeling.

The question as to his responsibility relates to the time of the homicide. It matters not what may have been his condition before or after, although evidence as to his condition before and after may be considered by you in ascertaining his condition at the time of the homicide.

Whether you find that the homicide occurred on the 20th or on the 21st day of September, 1907, is a matter of no consequence to the issue in this case. The essence of the charge is that defendant killed McKinnon with malice, and if you find that it was on or about the time charged it is sufficient.

104 Although the trial of one charged with the commission of a crime should always be consistent with the principles of justice—that is, he should be tried fairly, with all of the privileges, presumptions in his favor, and opportunities of defense which the long evolution of the practice of courts in common-law countries have gained for accused persons—yet the end sought for in such a trial is not justice, as we understand the word in relation to the trial of a civil case, where the object is to cause the litigating parties to render to each other what is rightfully due. The purpose of the criminal laws is to protect society, and the trial of one charged with their violation is an inquest as to his guilt, leading to his punishment if he is found guilty, without considering any compensation to the injured parties. The punishment relates to both the criminal and others—to him by way of removing him for a time or permanently from opportunities of repeating his crime and as a lesson and a warning to him against a repetition of his guilty conduct whenever he may regain his

liberty, and to others of like criminal tendencies as a deterring object lesson and example.

This explanation may throw some light on the theory reached by the courts in relation to the defense of insanity or intoxication, in which a status of responsibility as regards power of deliberation, capability of forming a design, or harboring an intent is necessary to a conviction, which, if present, the fact of insanity or intoxication is not a defense.

The reason of this rule is that the criminal law being enacted  
105 for the protection of society against violence and other conduct that is a menace to its security, the question of moral guilt does not figure in the investigation. The punishment of an intoxicated or partially insane person who, however, at the time of his lawless act has capacity to commit crime, as elsewhere explained, is justified as to himself, for the reasons given above, and as to others because it is a warning to others, including the intoxicated or partially insane who have a criminal capacity, and, having it, have sufficient intelligence and caution to be warned and deterred by the punishment of one of like capacity with themselves. This applies to the person who commits a crime while under the influence of liquor, but who still retains sufficient consciousness to be able to form a design or entertain a criminal intent, and to understand the character of the crime committed by him as to its lawlessness and the liability to punishment of one committing it.

There has been some divergence of opinion in the United States as to cases of homicide in which there is an absence of malice on the part of the defendant because his mental faculties at the time of the homicide are so demoralized by a condition of intoxication into which he has voluntarily entered that he is incapable of forming a specific intent to kill, some holding that under such circumstances the prisoner should be acquitted and others that he should be found guilty of manslaughter. The Supreme Court of the United States has recently adopted the latter view, and I charge you in accordance therewith that if the defendant, at the time of the killing, if you find

that he killed McKinnon, was in such a condition of mind, by  
106 reason of intoxication voluntarily acquired as to be incapable of forming a specific intent to kill, or of understanding the nature of what he was doing, the grade of his crime would be reduced to manslaughter. Manslaughter is the killing of a man unlawfully and wilfully, but without malice aforethought. Malice aforethought, as I have defined it to you, must be excluded from it; that is the doing of a wrongful act without cause or excuse and in the absence of mitigating facts, in such a way as to show a heart void of social duty and a mind fatally bent upon mischief. If that is driven out of the case it must come under the definition of the crime of manslaughter.

The principle of this rule appears to be this: That where a man voluntarily becomes drunk without any malicious purpose, he has without excuse or justification and with a reckless disregard for the

rights and the safety of others, entered into a course of excessive and unrestrained indulgence in intoxicants, in itself a criminal offense, which tends to destroy his judgment and confuse and dull his perceptions, and at the same time to magnify his grievances, real or fanciful, and to develop illusions, and, in short, to reduce him to a condition of irresponsibility and frenzy in which the normal restraints to violence are obliterated. In doing this he is held to be responsible for an act of homicide committed while in such condition to the extent at least of being guilty of manslaughter therefor, if his mind was incapable of forming a specific intent at the time of the homicide, or of murder if though intoxicated he yet was capable of such intent and of understanding the lawlessness of the act.

107 The evidence of the defendant's condition of excitement immediately after the homicide does not require you to conclude that he was in such a state of excitement at the time of the homicide, for in his stimulated condition, if you believe that he had been drinking throughout the day, the act of the homicide may well have thrown him off his balance to a degree and have produced that state of excitement immediately after the homicide which has been testified to by some of the witnesses. In like manner the evidence that the defendant, while present at the coroner's inquest and after beginning to answer questions concerning the homicide, became excited or, as he was described by one of the witnesses, became unstrung, such unstrung or excited condition you are at liberty under the testimony to attribute to the fact that the day before he had been drinking considerably, or to the other fact of his narration of the terrible tragedy in which he was himself concerned.

I instruct you that if you find from the evidence that the defendant made any statement or statements in relation to the offense charged in the indictment, after such offense is alleged to have been committed, you must consider such statement or statements all together. What the defendant said against himself, if anything, is likely to be true and is entitled to great weight because said against himself. What he said for himself you are not bound to believe because said in a statement or statements proved by the United States, but you may believe or disbelieve the whole or any part of it as it is shown to be true or false by the evidence in the case.

108 Counsel for the defendant has asked for this instruction as to positive and negative testimony in relation to the evidence of the intoxication of defendant:

"I instruct you that the defendant is presumed to be innocent, and that you can not therefore convict him on negative testimony, for nothing short of a universal negative excluding every possible doubt, will overcome the presumption in his favor. The positive testimony of one credible witness on any material matter is entitled to more weight than the testimony of several other witnesses equally credible who testify negatively on the same subject."

I cannot give this instruction exactly as asked for because it is not clear what the counsel for the defendant means by positive and nega-

tive testimony. Positive and negative testimony differs in this way: One witness may testify that a certain person said so and so; another witness may testify that he did not hear him say it. Unless he was so near to the person speaking that he must have heard the testimony his negative testimony cannot be equal to the testimony of the other witness who said that he heard him say it; and even if the second witness was near enough to have heard if he had been listening, yet his attention may have been occupied for the moment by something else, so that in that case his testimony is not as strong as that of the other. A denial of a proposition is not negative testimony in the sense that defendant's counsel apparently uses the words. A witness is asked if he went to town on a certain day, and he answers "no;" this answer is as good as the testimony of another who asserts that he saw him in town on that day, and may be better, and may be classed as positive testimony. Another witness says that he did not see him in town. This is negative testimony and is worth little, as  
109 the man may have been in town without being seen by such witness. A witness who answers "I don't know" to a question is not testifying at all, but is stating his inability to testify. There are degrees of positive testimony. One says a certain person was angry, another says he was somewhat excited and may have been angry; these are both instances of positive testimony but of different values. Another witness says he was not angry. This is positive testimony, though in a negative form, and is equal to the statement of the first witness.

Therefore in regard to the testimony of the witnesses in this case in relation to the intoxication of the defendant, you will understand that testimony that may differ as to the confidence of the witnesses as to their ability to answer a question, may be all positive testimony but different in strength. A witness who saw the man and yet makes no statement of his impressions as to the defendant's condition, but says substantially that he does not know, is confessing his inability to testify, but if he was so near the man and under circumstances that he ought to have known, such as conversing with him or watching him, then his answer that he "don't know," or other words to that effect, may be considered by you as a circumstance bearing on the probability that he would have known or would have received an impression on the subject if the defendant had been considerably intoxicated. On the other hand, the want of confidence of such a witness in his own knowledge might also be considered as to the question of the defendant's condition of sobriety, because usually a man who talks with another man who is perfectly sober would be able to testify to that effect. All of this evidence as to the drunken or sober condition of defendant must be weighed by you under  
110 this attempted analysis of such questions, keeping in mind the general rule that the evidence of a man who says that he knows a thing is better than that of another man who says he does not know it, having some opportunity to know, or who has a doubt of the matter.

I instruct you that the harbor of Honolulu is a haven or an arm of the Pacific Ocean, and that the waters of Honolulu Harbor are within the admiralty and maritime jurisdiction of the United States, and that the harbor of Honolulu is without the jurisdiction of any particular State.

To recapitulate: To murder, malice aforethought is essential. Malice is a formed design to kill. It includes premeditation, but the action of the mind is sometimes so swift that premeditation may exist within the shortest time. The act of killing implies malicious intent. Where the mind is so confused by intoxication that it is incapable of forming a design to kill or to understand the nature of such an act and its consequences, the crime of murder can not exist. Where such is the case, if the person has voluntarily placed himself in such condition of intoxication that he is incapable of forming a design to kill, and commits the homicide, he then is guilty of manslaughter.

The presumption of innocence follows the defendant in the trial until overcome by evidence of his guilt. You may not find the defendant guilty of either murder or manslaughter unless from a consideration of all the evidence you are satisfied of his guilt beyond a reasonable doubt. You can only find the defendant guilty  
111 when you cannot account for the homicide and the defendant's connection with it on a theory of innocence.

Your verdict may be "guilty of murder," or "guilty of murder without capital punishment," or "not guilty of murder but guilty of manslaughter," or "not guilty."

The unanimous assent of all of the jurors is necessary to any verdict.

(Sgd.) SANFORD B. DOLE,  
Judge, U. S. District Court.

MONDAY, November 9, 1908.

(Endorsed:) Title of court and cause. Indictment for murder. Charge to the jury. Filed November 9, 1909. Frank L. Hatch, clerk. By (sgd.) A. E. Murphy, deputy clerk.

112 In the United States District Court for the District of the Territory of Hawaii.

UNITED STATES OF AMERICA }  
vs. }  
JOHN WYNNE. }

*Exceptions of defendant relating to instructions.*

Comes now the defendant, John Wynne, and excepts:

1. To the giving by the court of the government's requested instruction numbered 19.

2. To the giving by the court of the government's requested instruction numbered 20.

3. To the giving by the court of the government's requested instruction numbered 21.

4. To the refusal of the court to give the defendant's requested instruction numbered 5.

5. To the giving by the court of a modification of defendant's requested instruction numbered 5, and to said defendant's requested instruction numbered 5, as by the court modified and given.

6. To the refusal of the court to give defendant's requested instruction numbered 7.

113 7. To the giving by the court of a modification of said defendant's requested instruction numbered 7 and to the said defendant's requested instruction numbered 7 as by the court modified and given.

8. To the giving by the court of its own instruction in regard to reasonable doubt.

9. To the refusal of the court to give the defendant's requested instruction numbered 8.

10. To the giving by the court of a modification of defendant's requested instruction numbered 8 and to said defendant's requested instruction numbered 8 as by the court modified and given.

11. To the refusal of the court to give defendant's requested instruction numbered 9.

12. To the giving by the court of a modification of said defendant's requested instruction numbered 9 and to said defendant's instruction numbered 9 as modified and given.

13. To the giving by the court of its own instruction in regard to presumption of innocence.

14. To the refusal of the court to give the defendant's requested instruction numbered 11.

15. To the giving by the court of a modification of said defendant's requested instruction numbered 11 and to said defendant's instruction numbered 11 as by the court modified and given.

16. To the giving of the court of its own instruction as to the definition of murder.

17. To the refusal of the court to give defendant's instruction numbered 12.

18. To the giving by the court of a modification of said  
114 defendant's requested instruction numbered 12 and to said defendant's instruction numbered 12 as by the court modified and given.

19. To the giving by the court of its own instruction as to the definition of manslaughter.

20. To the refusal of the court to give defendant's requested instruction numbered 13.

21. To the giving by the court of a modification of said defendant's requested instruction numbered 13 and to said defendant's instruction numbered 13 as by the court modified and given.

22. To the refusal by the court to give the defendant's requested instruction numbered 14.



23. To the giving by the court of a modification of said defendant's requested instruction numbered 14 and to said defendant's instruction numbered 14 as by the court modified and given.

24. To the refusal by the court to give defendant's requested instruction numbered 15.

25. To the giving by the court of a modification of said defendant's requested instruction numbered 15 and to said defendant's instruction numbered 15 as by the court modified and given.

26. To the refusal by the court to give defendant's requested instruction numbered 16.

27. To the giving by the court of a modification of said defendant's requested instruction numbered 16 and to said defendant's instruction numbered 16 as by the court modified and given.

115 28. To the refusal by the court to give defendant's requested instruction numbered 17.

29. To the giving by the court of a modification of defendant's requested instruction numbered 17 and to defendant's instruction numbered 17 as by the court modified and given.

30. To the refusal by the court to give defendant's requested instruction numbered 18.

31. To the giving by the court of a modification of defendant's requested instruction numbered 18 and to defendant's instruction numbered 18 as by the court modified and given.

32. To the refusal by the court to give defendant's requested instruction numbered 19.

33. To the giving by the court of a modification of defendant's requested instruction numbered 19 and to defendant's instruction numbered 19 as by the court modified and given.

34. To the refusal by the court to give defendant's requested instruction numbered 20.

35. To the giving by the court of a modification of defendant's requested instruction numbered 20 and to defendant's instruction numbered 20 as by the court modified and given.

36. To the refusal by the court to give defendant's requested instruction numbered 21.

37. To the giving by the court of a modification of defendant's requested instruction numbered 21 and to defendant's instruction numbered 21 as by the court modified and given.

38. To the refusal by the court to give defendant's requested instruction numbered 22.

39. To the giving by the court of a modification of defendant's requested instruction numbered 22 and to defendant's instruction numbered 22 as by the court modified and given.

116 40. To the refusal by the court to give defendant's requested instruction numbered 23.

41. To the giving by the court of a modification of defendant's requested instruction numbered 23 and to defendant's instruction numbered 23 as by the court modified and given.



42. To the refusal by the court to give defendant's requested instruction numbered 25.

43. To the refusal by the court to give defendant's requested instruction numbered 26.

44. To the refusal by the court to give defendant's requested instruction numbered 27.

45. To that portion of the court's own instruction and charge defining and relating to manslaughter.

46. To that portion of the court's own instruction and charge defining and relating to murder.

47. To that portion of the court's own instruction and charge relating to circumstantial evidence.

48. To that portion of the court's own instruction and charge relating to reasonable doubt.

49. To that portion of the court's own instruction and charge relating to presumption of innocence.

50. To that portion of the court's own instruction and charge relating to malice aforethought.

51. To that portion of the court's own instruction and charge relating to specific intent.

52. To that portion of the court's own instruction and charge relating to negative testimony.

53. To that portion of the court's own instruction and charge relating to mental competency, sanity, and capacity.

117 54. To that portion of the court's own instruction and charge relating to intoxication.

55. To that portion of the court's own instruction and charge relating to intoxication as affecting specific intent.

56. To that portion of the court's own instruction and charge relating to intoxication as affecting mental capacity.

57. To that portion of the court's own instruction and charge relating to malice.

58. To that portion of the court's own instruction and charge relating to malice aforethought.

59. To that portion of the court's own instruction and charge relating to express malice.

60. To that portion of the court's own instruction and charge relating to implied malice.

61. To that portion of the court's own instruction and charge relating to confessions.

62. To that portion of the court's own instruction and charge relating to admissions.

63. To that portion of the court's own instruction and charge relating to statements of the accused made against interest.

64. To that portion of the court's own instruction and charge relating to the presumption that a man intends to do what he actually does do.

65. To the giving by the court of government's requested instruction numbered 1.

118 66. To the giving by the court of a modification of the government's requested instruction numbered 1, and to the government's requested instruction numbered 1 as modified and given.

67. To the giving by the court of the government's requested instruction numbered 2.

68. To the giving by the court of a modification of the government's requested instruction numbered 2 and to the government's instruction numbered 2 as modified and given.

69. To the giving by the court of the government's requested instruction numbered 3.

70. To the giving by the court of a modification of the government's requested instruction numbered 3 and to the government's instruction numbered 3 as modified and given.

71. To the giving by the court of the government's requested instruction numbered 4.

72. To the giving by the court of a modification of the government's requested instruction numbered 4 and to the government's instruction numbered 4 as modified and given.

73. To the giving by the court of the government's requested instruction numbered 7.

74. To the giving by the court of a modification of the government's requested instruction numbered 7 and to the government's instruction numbered 7 as modified and given.

75. To the giving by the court of the government's requested instruction numbered 8.

76. To the giving by the court of a modification of the government's requested instruction numbered 8 and to the government's instruction numbered 8 as modified and given.

119 77. To the giving by the court of the government's instruction numbered 9.

78. To the giving by the court of a modification of the government's requested instruction numbered 9 and to the government's instruction numbered 9 as modified and given.

79. To the giving by the court of the government's instruction numbered 10.

80. To the giving by the court of a modification of the government's instruction numbered 10 and to the government's instruction numbered 10 as modified and given.

81. To the giving by the court of the government's requested instruction numbered 11.

82. To the giving by the court of a modification of the government's requested instruction numbered 11 and to the government's instruction numbered 11 as modified and given.

83. To the giving by the court of the government's requested instruction numbered 12.

84. To the giving by the court of a modification of the government's instruction numbered 12 and to the government's instruction numbered 12 as modified and given.

85. To that portion of the court's own instruction and charge relating to motive.

86. To the giving by the court of the government's instruction numbered 14.

87. To the giving by the court of a modification of the government's requested instruction numbered 14 and to the government's instruction numbered 14 as modified and given.

88. To the giving by the court of the government's requested instruction numbered 15.

120 89. To the giving by the court of a modification of the government's instruction numbered 15 and to the government's instruction numbered 15 as modified and given.

90. To the giving by the court of the government's requested instruction numbered 16.

91. To the giving by the court of a modification of the government's requested instruction numbered 16 and to the government's instruction numbered 16 as modified and given.

92. To the giving by the court of the government's requested instruction numbered 17.

93. To the giving by the court of a modification of the government's requested instruction numbered 17 and to the government's instruction numbered 17 as modified and given.

94. To the giving by the court of the government's requested instruction numbered 18.

95. To the giving of the court's own instructions and charge as a whole.

Honolulu, November 9th, 1908.

(Sgd) JOHN WYNNE,  
*Defendant above named.*

(Endorsed:) Title of court and cause. Exception of defendant relating to instructions. Filed Nov. 9, 1908. Frank L. Hatch, clerk. By A. E. Murphy, deputy clerk.

121 In the District Court of the United States, in and for the District of Hawaii.

THE UNITED STATES OF AMERICA, PLAINTIFF, }  
vs. }  
JOHN WYNNE, DEFENDANT. }

*Verdict.*

We, the jury in the above-entitled cause, duly empaneled and sworn, do find the defendant, John Wynne, guilty of murder in manner and form as charged in the indictment herein.

(Sgd) JOHN LUCAS, *Foreman.*

(Endorsed:) No. 366. Title of court and cause. United States of America vs. John Wynne. Verdict. Filed Nov. 9, 1908. Frank L. Hatch, clerk. By (sgd) A. E. Murphy, deputy clerk.

122 [From minutes of the United States District Court, vol. 6, page 204, Tuesday, November 10, 1908.]

### Title of Court and Cause.

On this day came Mr. W. T. Rawlins, assistant United States district attorney, and made a motion that a certain day be set for sentence herein, and Mr. F. E. Thompson, of counsel for defendant, being present, stated that he would file a "motion in arrest of judgment." This case was thereupon continued for sentence to Friday, November 13th, 1908, at 10 o'clock a. m.

123 [From minutes of the United States District Court, vol. 6, page 210, Friday, November 13, 1908.]

### Title of Court and Cause.

On this day came the United States by its district attorney, Mr. Robert W. Breckons, and said defendant in person with his counsel, Messrs. Thompson & Clemons, and this cause came on regularly for sentence. Whereupon Mr. Clemons, of counsel for defendant, filed in open court a "motion in arrest of judgment," which motion was overruled. Whereupon Mr. Clemons noted an exception to the ruling of the court, and thereafter said defendant was asked if he had anything to say why the sentence of the law should not now be pronounced against him, and nothing appearing or being shown, it was by the court ordered that said defendant, John Wynne, on a certain day between the hours of nine o'clock in the forenoon and five o'clock in the afternoon, namely, Wednesday, the 17th day of February, 1909, be hanged by the neck until he is dead. Mr. Clemons at this time noted an exception to the sentence herein and gave notice of the filing of a writ of error, which was allowed by the court.

124 United States District Court for the Territory of Hawaii.

UNITED STATES OF AMERICA }  
*versus*  
 JOHN WYNNE, DEFENDANT. }

### *Motion in arrest of judgment.*

And now, after verdict against John Wynne, defendant aforesaid, and before sentence, comes the said defendant in his own proper person and moves the court here to arrest judgment herein, on each and every count in the indictment, and not pronounce the same for the reasons following, to wit:

1. Because this court is and was at all times herein without jurisdiction to try the said defendant for any act set forth in the said indictment or for any act set forth in any count thereof;

2. Because the facts stated in said indictment or in any count thereof do not constitute an offense against the laws of the United States of America;

3. Because the statute upon which the indictment herein is predicated, to wit, Revised Statutes of the United States, section 5339, is unconstitutional and void;

4. Because no judgment against the said defendant can be lawfully rendered on the record herein.

And this the said defendant is ready to verify.

Wherefore, and for other errors manifest in the record herein, the said defendant prays that judgment against him be arrested as aforesaid, and that he be discharged and allowed to go hence without day.

(Sgd) JOHN WYNNE,  
Defendant above named.

HONOLULU, November 13th, 1908.

125 United States District Court for the Territory of Hawaii.

UNITED STATES OF AMERICA }  
versus }  
JOHN WYNNE, DEFENDANT. }

*Affidavit of Frank E. Thompson, defendant's attorney, in support of motion in arrest of judgment.*

UNITED STATES OF AMERICA,  
*District and Territory of Hawaii, ss:*

Frank E. Thompson, being first duly sworn, on oath deposes and says: That he is the attorney for John Wynne, the defendant herein-above named, and makes this affidavit for the said defendant and on his behalf; that said defendant, John Wynne, was tried in the above-entitled cause before the above-entitled court and a jury on an indictment charging him, the said defendant, with murder, and was by said jury on, to wit, November 9th, 1908, found guilty as charged. Depo-  
nent further says: (1) That this court above entitled is and was at all times herein aforesaid without jurisdiction to try the said defendant for any act set forth in the said indictment or for any act set forth in any count thereof; (2) that the facts in said indictment or in any count thereof do not constitute an offense against the laws of the United States of America; (3) that the statute upon which the said indictment is predicated, to wit, Revised Statutes of the United States, section 5339, is unconstitutional and void; (4) that no judgment against the said defendant can be lawfully rendered on the record herein. And the deponent makes this affidavit in support of the said defendant's motion in arrest of judgment hereto annexed; and further the deponent sayeth not.

(Sgd) FRANK E. THOMPSON.

Subscribed and sworn to before me this 13th day of November, A. D. 1908.

[SEAL.]

(Sigd) A. E. MURPHY,  
Clerk of the United States District Court  
for the Territory of Hawaii.

126 (Endorsed:) Title of court and cause. Motion in arrest of judgment and affidavit in support thereof. Filed Nov. 13, 1908. Frank L. Hatch, clerk. By (sgd) A. E. Murphy, deputy clerk.

127 THE UNITED STATES OF AMERICA,  
*District of Hawaii, ss:*

In the United States District Court for the Territory of Hawaii.

THE UNITED STATES OF AMERICA, PLAINTIFF,	} Indictment for murder. No. 366.
<i>vs.</i>	
JOHN WYNNE, DEFENDANT.	

*Judgment and sentence.*

On motion of Robert W. Breckons, esq., attorney for the United States for the District and Territory of Hawaii, the said defendant, John Wynne, was brought to the bar of this court, in the custody of the marshal of said district, and it being demanded of him what he has to say or can say why the sentence of the law, upon the verdict of guilty of murder heretofore returned against him by the jury in this cause, on the ninth day of November, in the year of our Lord one thousand nine hundred and eight, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said.

Whereupon, the premises being seen, and by the court well and sufficiently understood, it is considered by the court that the said marshal of the district aforesaid cause the said John Wynne to be taken hence, and him, the said John Wynne, safely and securely keep, from the date hereof until Wednesday, the 17th day of February, in the year of our Lord one thousand nine hundred and nine, and on that day, and between the hours of nine o'clock in the forenoon and five o'clock of the afternoon of said day, the said marshal cause the said John Wynne to be taken to some convenient place within this district, to be appointed by said marshal, and then and there, between the said hours of nine o'clock in the forenoon and five o'clock in the afternoon, on Wednesday, the said 17th day of February, in the year of our Lord one thousand nine hundred and nine, cause the said John Wynne to be hanged by the neck until he is dead.

And the clerk of this court is hereby required to furnish the marshal of this district with a duly certified copy of this judgment, sentence, and order, which shall be returned by said marshal with a full and true account of the execution of the same.

(Sgd) SANFORD B. DOLE,

*Judge, U. S. District Court for the Territory of Hawaii.*

NOVEMBER 13TH, 1908.

(Endorsed:) Title of court and cause. Judgment and sentence. Entered in J & D Bk. 1 at page 713. Filed Friday, November 13th, 1908. Frank L. Hatch, clerk. By (sgd.) A. E. Murphy, deputy clerk.

129 In the United States District Court for the District of the Territory of Hawaii.

THE UNITED STATES OF AMERICA }  
*versus*  
 JOHN WYNNE. }

*Motion.*

*To the Honorable Sanford B. Dole, judge of the United States District Court for the Territory of Hawaii:*

Comes now the defendant herein in his own proper person and moves that he be allowed sixty (60) days from and after the expiration of the present pending October, 1908, term of this court within which to prepare and file in the above entitled action a bill of exceptions and to prepare and file a petition for writ of error to the Supreme Court of the United States or such appellate court as he shall be advised, or to take such other action as he may be advised to prepare or perfect appellant proceedings herein.

This motion is based on the records and files herein and on the affidavit of Charles F. Clemons hereto annexed and made part hereof.

Honolulu, January 8, 1909.

(Sgd.) JOHN WYNNE, *Defendant.*

We hereby join in the foregoing motion.

(Sgd.) THOMPSON & CLEMONS,  
*Attorneys for Defendant,*  
 By CHARLES F. CLEMONS.

130 UNITED STATES OF AMERICA,  
*Territory of Hawaii, City and County of Honolulu, ss.*

CHARLES F. CLEMONS, being first duly sworn, on oath deposes and says: That he is one of the members of the firm of Thompson & Clemons, attorneys for John Wynne, the defendant in the above entitled action, and as such attorney is authorized to make and does make this affidavit for and in behalf of said defendant and in support of the foregoing motion; that the said defendant intends to have the judgment and proceedings in the foregoing action reviewed by an appellate court on writ of error or appeal, and has lately obtained for that purpose, at great expense, the transcript of testimony taken at the trial of said cause, but affiant as said attorney is and has as yet been unable to obtain from the clerk of the above-entitled court a transcript of his minutes of the proceedings in said cause and certified copies of the record therein, and affiant believes and is informed by the said clerk that the said clerk will be engaged until as late as January 21, 1909, in the preparation of the transcript and record on appeal in the so-called case of the "Manchuria," and thereafter until January 31, 1909, in the preparation of the transcript and record on appeal in the case of the United States versus Augusta



Welsh, and can not attend to the preparation of a transcript and record for said defendant before at least February 1, 1909, and affiant says and believes that it will require sixty days from the end of the present term of said court within which to safely prepare a bill of exceptions and petition for writ of error in said cause of John Wynne, defendant. That affiant is informed and believes that said term of court will probably close on or about Monday, January 11, 1909.

131 And affiant makes this affidavit in support of the foregoing motion.

(Sgd.) CHARLES F. CLEMONS.

Subscribed and sworn to before me this 8th day of January, 1909.

[SEAL.] (Sgd.) CHAS. L. SEYBOLT,  
Notary Public First Judicial Circuit,  
Territory of Hawaii.

(Endorsed:) No. 366. Title of court and cause. Motion. Filed Jan. 8th, 1909. A. E. Murphy, clerk. By (sgd.) A. A. Deas, deputy clerk.

132 The United States District Court in and for the Territory of Hawaii.

UNITED STATES OF AMERICA, PLAINTIFF, }  
versus  
JOHN WYNNE, DEFENDANT. }

*Stipulation.*

It is hereby stipulated and agreed by and between the parties hereto by their respective attorneys that the defendant, John Wynne, do have sixty days from the expiration of the present pending October, 1908, term of the above-entitled court within which to prepare and file a bill of exceptions herein and petition for writ of error herein, and to take any other or different action in order to have the judgment and proceedings in the above-entitled cause reviewed by an appellate tribunal.

Honolulu, January 8, 1909.

THE UNITED STATES OF AMERICA,  
*Plaintiff,*

By ROBERT W. BRECKONS,  
*United States District Attorney,*

(Sgd.) By WILLIAM T. RAWLINS,  
*Asst. U. S. Dis. Atty.*

JOHN WYNNE, *Defendant,*

(Sgd.) By THOMPSON & CLEMONS,  
CHARLES F. CLEMONS,

*His Attorneys.*

The foregoing stipulation is hereby approved.

(Sgd.) S. B. DOLE, *Judge.*

JANUARY 8TH, 1909.

(Endorsed:) Title of court and cause. Stipulation. Filed Jan. 8th, 1909. A. E. Murphy, clerk. By (sgd.) A. A. Deas, deputy clerk.

133 United States District Court in and for the Territory of Hawaii.

UNITED STATES OF AMERICA, PLAINTIFF, }  
   *vs.*  
 JOHN WYNNE, DEFENDANT. }

*Order allowing time in the matter of appellate proceedings.*

On motion of defendant John Wynne, and good cause appearing therefor, it is hereby ordered that the said defendant have sixty (60) days from the expiration of the present pending October, 1908, term of the above-entitled court within which to prepare and file a bill of exception herein and a petition for writ of error herein, and within which to take such other or different action as he may be advised in order to have the judgment and proceedings in the above-entitled cause reviewed by an appellate tribunal.

Done at Honolulu this 8th day of January, A. D. 1909.

(Sgd.) S. B. DOLE,

*Judge of the United States District Court for the  
 Territory of Hawaii.*

(Endorsed:) Title of court and cause. Order allowing time. Filed Jan. 8th, 1909. A. E. Murphy, clerk, by (sgd.) A. A. Deas, deputy clerk.

134 In the District Court of the United States in and for the District and Territory of Hawaii.

THE UNITED STATES OF AMERICA, PLAINTIFF, }  
   *vs.*  
 JOHN WYNNE, DEFENDANT. } No. 366.

*Transcript of proceedings on arraignment.*

NOVEMBER 11TH, 1907.

The above-entitled cause came on regularly at this time for arraignment of defendant, Mr. Robert W. Breckons, United States district attorney, being present on behalf of the plaintiff, and the defendant

being present in person, and also represented by Mr. C. F. Clemons, his counsel, whereupon the following proceedings were had:

Mr. CLEMONS. If your honor please, I would like to have the name of Thompson & Clemons entered for defendant, appearing specially at this time, reserving all rights of exception that we may have.

The COURT. You mean specially for the purpose of arraignment and plea?

Mr. CLEMONS. For all purposes. We consent to arraignment at this time, but we save all rights of exception.

Mr. BRECKONS. We understand that. We won't ask for plea at this time. We want to get rid of the arraignment.

(Here the clerk read the indictment to the defendant.)

135 Mr. CLEMONS. If the court please, as I said before, I would like to have it appear of record that we appear only specially and save our plea and all right of exception to the indictment.

The COURT. What do you mean by appearing specially? You are here as counsel.

Mr. CLEMONS. Yes; but we want to save all our rights as to the indictment. It don't do any harm to have it that way.

Mr. BRECKONS. Well, do counsel represent this defendant only for arraignment; in other words, when this case is passed has defendant still got counsel?

The COURT. (To Mr. Clemons.) You are counsel for trying the case to its conclusion?

Mr. CLEMONS. We are counsel for all purposes. At this time we wish to save all rights.

The COURT. You ask that the plea be reserved?

Mr. CLEMONS. Yes, sir.

The COURT. The word "specially" is a little confusing to me.

Mr. CLEMONS. At this time we represent the defendant, but as I say we reserve all rights possible.

Mr. BRECKONS. I want the record to show that clearly, because I understand that counsel is before your honor for other purposes—something about taking depositions.

The COURT. (To Mr. Clemons.) You ask to have the plea reserved until what time?

Mr. CLEMONS. The plea and all exceptions; Mr. Thompson will be back on the 22nd, and I would like to have it go over until after his return.

Mr. BRECKONS. That is agreeable to counsel for the Government, that the plea may be reserved, together with such exceptions as attorneys for defendant may want to make until Monday,  
136 the 25th, two weeks from to-day.

The COURT. So ordered, and I think there had better be a general entry that you appear for the defendant.

Mr. CLEMONS. Yes, but saving all rights of exception and plea.

The COURT. Well, that is a reservation of the plea.

I hereby certify that the foregoing transcript is a full, true, and correct transcript of my shorthand notes, taken on the proceedings at arraignment in the above-entitled cause, and as such is entitled to faith and credence.

Honolulu, T. H., January 29, 1909.

A. A. DEAS,  
*Former Reporter U. S. District Court.*

137 In the District Court of the United States in and for the District and Territory of Hawaii.

THE UNITED STATES OF AMERICA, PLAINTIFF,	} No. 366.
<i>vs.</i>	
JOHN WYNNE, DEFENDANT.	

*Proceedings on filing of demurrer.*

DECEMBER 2ND, 1907.

The above entitled cause came on regularly at this time for further proceedings, Mr. Robert W. Breckons, United States district attorney, being present on behalf of the plaintiff, and the defendant being present in person and also represented by Mr. F. E. Thompson, whereupon the following proceedings were had:

Mr. THOMPSON. In this matter I have a demurrer to the indictment, which, in all candor, I haven't very much faith in. Mr. Breckons said he was willing to take a ruling on it without argument and so am I. The indictment follows very closely a preceding case in which the indictment was held good, but I have tried to say what I think may be a small advantage. I will file it without argument and take a ruling on it.

The COURT. Then the plea may go over until after the ruling on demurrer. Let the plea go over until Saturday.

138 I hereby certify that the foregoing transcript is a full, true, and correct transcript of my shorthand notes taken on proceedings on filing of demurrer in the above entitled cause, and as such is entitled to faith and credence.

Honolulu, January 29, 1909.

A. A. DEAS,  
*Former Reporter U. S. District Court.*

139 In the District Court of the United States in and for the District and Territory of Hawaii.

THE UNITED STATES OF AMERICA, PLAINTIFF,	} No. 366.
<i>vs.</i>	
JOHN WYNNE, DEFENDANT.	

*Transcript of proceedings at decision on demurrer.*

DECEMBER 14, 1907.

The above entitled cause came on regularly at this time for decision on demurrer, Mr. Robert W. Breckons, United States district

attorney, being present on behalf of the plaintiff, and defendant being present in person and also *be* represented by his counsel, F. E. Thompson, esq., whereupon the following proceedings were had:

The COURT. The demurrer is overruled.

Mr. THOMPSON. We note an exception and ask that we may have until next Wednesday to file a motion to elect, at which time we shall be ready to proceed.

The COURT. That is allowed.

I hereby certify that the foregoing transcript is a full, true, and correct transcript of my shorthand notes, taken on the proceedings at decision of demurrer in the above entitled cause, and as such is entitled to faith and credence.

Honolulu, Hawaii, January 29, 1909.

A. A. DEAS,  
*Former Reporter U. S. Dist. Court.*

140 In the District Court of the United States in and for the District and Territory of Hawaii.

THE UNITED STATES OF AMERICA, PLAINTIFF,	} No. 366.
vs.	
JOHN WYNNE, DEFENDANT.	

*Transcript of proceedings upon filing of motion to compel election, etc.*

DECEMBER 18, 1907.

The above entitled cause came on regularly at this time for further proceedings, Mr. Robert W. Breckons, United States district attorney, being present on behalf of the plaintiff, and the defendant being present in person and also being represented by Mr. F. E. Thompson, his counsel, whereupon the following proceedings were had:

Mr. THOMPSON. We have for filing a motion to compel election, upon which count the United States shall proceed, supported by affidavit, all of which has been ruled upon by the Supreme Court of the United States in a recent case, holding that it was not necessary. I don't want to argue it, but simply want to put it in as a matter of precaution.

Mr. BRECKONS. The Supreme Court is clear that it should be overruled; counsel will not deny that?

The COURT. I am ready to make a pro forma ruling to that effect.

141 Mr. BRECKONS. I ask for a ruling on the motion and am willing to submit it without argument.

The COURT. Then I will take the matter under advisement and rule on it within a day or two.

Mr. THOMPSON. I will cite one authority to your honor and send it to you.

I hereby certify that the foregoing transcript is a full, true, and correct transcript of my shorthand notes taken on the above pro-

ceedings in the above entitled cause, and as such is entitled to faith and credence.

Honolulu, T. H., January 29, 1909.

A. A. DEAS,  
*Former Reporter U. S. District Court.*

142 In the District Court of the United States in and for the  
District and Territory of Hawaii.

THE UNITED STATES OF AMERICA, PLAINTIFF,	} No. 366.
<i>vs.</i>	
JOHN WYNNE, DEFENDANT.	

*Proceedings on ruling on motion to compel election.*

JANUARY 25, 1908.

The above entitled cause came on regularly at this time for further proceedings, Mr. W. T. Rawlins, assistant United States district attorney, being present on behalf of the plaintiff and the defendant being present in person and also being represented by Mr. C. F. Clemons, his counsel, whereupon the following proceedings were had:

The COURT. I will read a ruling on the motion to compel election.  
(The court reads ruling on motion to compel election.)

143 I hereby certify that the foregoing transcript is a full, true, and correct transcript of my shorthand notes taken on the proceedings upon ruling on motion to compel election in the above entitled cause, and as such is entitled to faith and credence.

Dated, Honolulu, T. H., January 29, 1909.

A. A. DEAS,  
*Former Reporter, U. S. District Court.*

144 In the District Court of the United States in and for the  
District and Territory of Hawaii.

THE UNITED STATES OF AMERICA, PLAINTIFF,	} No. 366.
<i>vs.</i>	
JOHN WYNNE, DEFENDANT.	

*Proceedings on motion to elect.*

FEBRUARY 24TH, 1908.

The above entitled cause came on regularly at this time for further proceedings, Mr. Robert W. Breckons, United States district attorney, being present on behalf of the plaintiff, and the defendant being present in person and also represented by his counsel, Mr. F. E. Thompson, whereupon the following proceedings were had:

Mr. BRECKONS. In this case the Government elects to proceed under the last four counts of the indictment.



I hereby certify that the foregoing transcript is a full, true, and correct transcript of my shorthand notes taken at the above proceedings in the above entitled cause, and as such is entitled to faith and credence.

Dated, Honolulu, T. H., January 29, 1909.

A. A. DEAS,  
*Former Reporter, U. S. District Court.*

145 In the District Court of the United States in and for the  
District and Territory of Hawaii.

THE UNITED STATES OF AMERICA, PLAINTIFF, }  
vs. } No. 366.  
JOHN WYNNE, DEFENDANT. }

*Transcript of proceedings had upon case being submitted to jury, etc.*

NOVEMBER 9TH, 1908.

The above entitled cause came on regularly at this time for further proceedings, Mr. William T. Rawlins, assistant United States district attorney, being present on behalf of the plaintiff, and the defendant being present in person and also being represented by Mr. F. E. Thompson, his counsel, whereupon the following proceedings were had:

The COURT. This case will go to the jury to-day, without any doubt.

Mr. THOMPSON. We are ready now.

The COURT. I mean the argument of counsel and the charge of the court will all go in to-day.

Mr. THOMPSON. The charge to the jury—the argument of this counsel will not take over an hour.

(The court hereupon excused all the petit jurors not engaged in the trial of this case until Nov. 8, 1908.)

146 Mr. THOMPSON. At this time we wish to present, without argument, the following motion, it already having been presented to your honor, but we wish it presented before the jury. (Reads motion for directed verdict.)

The COURT. The motion is denied.

Mr. THOMPSON. To which we respectfully except. Defendant requests the following instructions. (Hands copy of defendant's requested instructions to the court.)

Mr. RAWLINS. I ask that my instructions be considered as presented at this time; they have been presented before.

Hereupon Mr. Rawlins argued the case for the Government to the jury.

Mr. Thompson replied, arguing the case for the defendant to the jury.

Mr. Rawlins argued for the Government in closing.

Mr. THOMPSON. We except to the remarks of counsel about witness not taking the stand, and ask the court to instruct the jury to disregard them.

The COURT. He has not commented on it; the jury may disregard it; it has nothing to do with the case.

Mr. Thompson argues.

Mr. Rawlins argues.

The COURT. I will instruct the jury that if there is any uncertainty in their minds they should be directed upon what the trial shows upon that point.

The court here read its charge to the jury.

At the conclusion of the reading of the court's charge to the jury Mr. Thompson handed to the clerk exceptions to the charge to the jury on behalf of defendant.

147 The COURT. I will leave the instructions of the court on the table so that the jury may refer to them if they wish; is there any objection to that?

Mr. THOMPSON. It is entirely unusual.

The COURT. Do you object to it?

Mr. THOMPSON. I would rather have the court act.

The COURT. In some jurisdictions it is required by law, and I suppose it is a good thing, because sometimes, after a long charge of this kind, they may wish to refresh their memory.

Mr. THOMPSON. I have no objection if your honor wishes to do it; if it is the custom that has been followed here, I have no objection.

The COURT. We have followed it out to some extent.

(The court leaves instructions to the jury on the table for the use of the jury should they desire it.)

(Hereupon the United States marshal and his deputy were sworn in by the clerk to take charge of the jury.)

The COURT. Gentlemen of the jury, I leave four forms of verdict, according to the instructions of the court, to be used by you according as you may decide the case.

The court room was here vacated by everyone except the jury, who remained to deliberate upon their verdict. After due deliberation the marshal was notified that the jury had agreed upon a verdict, and the marshal so notified the court and the various court officers and the defendant and his counsel, all of whom thereupon came into the court, and the court having been called to order, the following proceedings were had:

Mr. Lucas, foreman of the jury, handed the verdict to the court.

The COURT. Gentlemen of the jury, listen to your verdict. (Reads verdict.)

148 The COURT. Is that your verdict, gentlemen?

The JURY. Yes, sir.

Mr. THOMPSON. We respectfully except to the verdict as being contrary to the law and evidence, and the weight of the evidence, and respectfully give notice of motion for a new trial.

I hereby certify that the foregoing transcript is a full, true, and correct transcript of my shorthand notes taken on the proceeding.

had upon the case being submitted to the jury in the above entitled cause, and as such is entitled to faith and credence.

Honolulu, T. H., January 29, 1909.

A. A. DEAS,  
*Former Reporter U. S. District Court.*

149 In the District Court of the United States in and for the  
District and Territory of Hawaii.

THE UNITED STATES OF AMERICA, PLAINTIFF,  
vs.  
JOHN WYNNE, DEFENDANT. } No. 366.

*Proceedings had at sentence and judgment.*

NOVEMBER 13TH, 1908.

The above entitled cause came on regularly at this time for further proceedings, Mr. Robert W. Breckons, United States district attorney, being present on behalf the plaintiff, and the defendant being present in person, and also represented by Mr. C. F. Clemons, his counsel, whereupon the following proceedings were had:

Mr. Clemons presented to the court and read a motion in arrest of judgment and affidavit in support thereof.

150 Mr. BRECKONS. I understand the motion in arrest of judgment raises points all of which were passed on by your honor at some stage or other in the proceedings; it is a mere pro forma motion. (To Mr. Clemons) That is correct, is it not?

Mr. CLEMONS. Yes.

Mr. BRECKONS. I ask that the motion be overruled, and that the defendant be given his exception.

The COURT. The motion is denied.

Mr. CLEMONS. To which order, if the court please, we note an exception.

Mr. BRECKONS. Now I ask that sentence be imposed upon the defendant, and that he be asked if he has anything to say why judgment should not be pronounced against him.

The COURT. Mr. Wynne, have you anything to say why sentence should not be pronounced against you on the verdict of "guilty" as found by the jury against you?

The DEFENDANT. No, your honor.

The COURT. Hear your sentence: (The court read the sentence to defendant.)

151 Mr. CLEMONS. If the court please, to the court's sentence and judgment of the defendant, the defendant notes an exception, and at this time defendant also gives notice of intention to sue out a writ of error in the Supreme Court of the United States.

I hereby certify that the foregoing transcript is a full, true, and correct transcript of my shorthand notes, taken on the proceedings

therein mentioned in the above entitled cause, and as such is entitled to faith and credence.

Honolulu, T. H., January 29, 1909.

A. A. DEAS,  
*Former Reporter U. S. District Court.*

152

HONOLULU, March 23, 1909.

The official reporter of the United States District Court for the Territory of Hawaii being absent at the proceedings, held on this date, in this cause, said proceedings are covered by the clerk's minutes of even date.

153 [From minutes of the United States District Court, vol. 4, page 348, Monday, March 15, 1909.]

Title of Court and Cause.

On this day came the United States, by its assistant district attorney, Mr. W. T. Rawlins, and Mr. F. E. Thompson, of the firm of Thompson & Clemons, representing the defendant herein, and this cause was called for hearing on defendant's assignment of errors. Thereupon, on motion of counsel for defendant, it was ordered by the court that this hearing be continued until Tuesday, March 16th, at 10 o'clock a. m.

154 [From minutes of the United States District Court, vol. 4, page 351, Tuesday, March 16, 1909.]

Title of Court and Cause.

On this day came the United States, by its assistant district attorney, Mr. W. T. Rawlins, who moved the court that the hearing on defendant's bill of exceptions, heretofore continued to this date, be continued until again moved on the calendar by counsel, stating that Mr. C. F. Clemons, of the firm of Thompson & Clemons, attorneys for defendant, consented thereto, which motion the court granted, and it was so ordered.

155 [From minutes of the United States District Court, vol. 4, page 358, Tuesday, March 23, 1909.]

Title of Court and Cause.

On this day came the United States, by its district attorney, Mr. R. W. Breckons, and its assistant district attorney, Mr. W. T. Rawlins, and said defendant in person, with his counsel, Mr. C. F. Clemons, of the firm of Thompson & Clemons. Thereupon this cause was called for hearing on defendant's bill of exceptions. Upon the presentation of said bill of exceptions to the court, there being no objection by Mr. Rawlins, the court signed an order allowing same. Thereupon Mr. Clemons filed in open court defendant's petition for a

writ of error herein, and also assignment of errors, stating that he would present the proper order for same to the court for signature later on, and the court stated that such order would be signed upon its presentation. Mr. Clemons then moved the court for an order directing the transmission to Washington, D. C., with the record on writ of error herein, of "Government's Exhibit No. 2," the same being "Certificate of enrollment" on file in the office of the clerk of this court. There being no objection by Mr. Rawlins, the court stated that it would sign a written order to that effect. Upon motion of A. E. Murphy, esq., the clerk of this court, for an order allowing him sixty days further time from this date within which to prepare and forward to the Supreme Court of the United States, at Washington, D. C., the transcript of the record herein, it was so ordered by the court.

156 THE UNITED STATES OF AMERICA,  
*District of Hawaii, ss.*

In the United States District Court for the Territory of Hawaii.

THE UNITED STATES OF AMERICA, PLAINTIFF,	} No. 366.
<i>versus</i>	
JOHN WYNNE, DEFENDANT.	

DEFENDANT'S BILL OF EXCEPTIONS.

Be it remembered, that on, to-wit, October 25th, A. D. 1907, in the above entitled court and cause, and at the October, A. D. 1907, term of said court, the grand jury then sitting at said term and court presented and filed herein their indictment against the said defendant, John Wynne, in words and figures as follows, to-wit:

THE UNITED STATES OF AMERICA,  
*District of Hawaii, ss.*

In the District Court of the United States in and for the district aforesaid, at the October term thereof, A. D. 1907.

*First count.*

The grand jurors of the United States, empaneled, sworn and charged at the term aforesaid, of the court aforesaid, on their oath present that John Wynne, late of the district aforesaid, on  
157 the twentieth day of September, in the year of our Lord one thousand nine hundred and seven, with force and arms, on the high seas, and within the jurisdiction of this court and within the admiralty and maritime jurisdiction of the said United States of America, and out of the jurisdiction of any particular State of the said United States of America, in and on board of a certain American

vessel, the same being then and there a vessel called and named "Rosecrans," then and there belonging to the "National Oil and Transportation Company," a corporation organized under and by virtue of the laws of the State of California, in and upon one Archibald F. McKinnon, then and there being on board said vessel, unlawfully, feloniously, wilfully, and of his malicious aforethought, did make an assault, and that the said John Wynne then and there, to wit, upon the high seas, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, in and on board of said vessel, with a certain hammer, him, the said Archibald F. McKinnon, in and upon the head of the said Archibald F. McKinnon, unlawfully, feloniously, wilfully and of his malice aforethought, did strike, penetrate and wound, thereby then and there, to wit, upon the high seas, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, in and on board of said vessel, giving unto the said Archibald F. McKinnon, in and upon the head of the said Archibald F. McKinnon divers mortal wounds, of which said mortal wounds the said Archibald F. McKinnon then and there, to wit, upon the high seas, within the admiralty and  
 158 maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, in and on board of said vessel, instantly died. And so the jurors aforesaid upon their oath aforesaid do say and present that the said John Wynne, unlawfully, feloniously, wilfully, and of his malice aforethought him the said Archibald F. McKinnon, then and there, to wit, upon the high seas, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, in and on board of said vessel, in manner and form aforesaid, did kill and murder, against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

And the jurors aforesaid, upon their oath aforesaid, do further present and say, that the said District of Hawaii is the district of the United States of America into which the said John Wynne was first brought after committing the offense aforesaid.

(Sgd.)

ROBT. W. BRECKONS,

*United States Attorney for the District of Hawaii.*

A true bill.

(Sgd.)

J. F. WOODS, *Foreman of the Grand Jury.*

159

*Second count.*

And the said grand jurors of the United States, empaneled, sworn, and charged at the term aforesaid of the court aforesaid, on their



oath aforesaid, present that John Wynne, late of the district aforesaid, on the twentieth day of September, in the year of our Lord one thousand nine hundred and seven, with force and arms, on the high seas and within the jurisdiction of this court and within the admiralty and maritime jurisdiction of the said United States of America, and out of the jurisdiction of any particular State of the said United States of America, in and on board of a certain American vessel, the same being then and there a vessel called and named "Rosecrans," then and there belonging to the "National Oil and Transportation Company," a corporation organized under and by virtue of the laws of the State of California, in and upon one Archibald F. McKinnon, then and there being on board of said vessel, unlawfully, feloniously, wilfully, and of his malice aforethought, did make an assault, and that the said John Wynne then and there, to wit, upon the high seas, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, in and on board of said vessel, with a certain hammer, him, the said Archibald F. McKinnon, in and upon the head of the said Archibald F. McKinnon, unlawfully, feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound, thereby then and there, to wit, upon the high seas, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, in and on board of said vessel, giving unto the said Archibald F. McKinnon, in and upon the head of the said Archibald F. McKinnon, divers mortal wounds, of which said mortal wounds the said Archibald F. McKinnon then and there, to wit, upon the high seas, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, languished, and thereafter, and on, to wit, the twentieth day of September, in the year of our Lord one thousand nine hundred and seven, at and within the Territory and District of Hawaii, to wit, on the island of Oahu, at and within the said Territory and District of Hawaii, languishing, died. And so the jurors aforesaid upon their oath aforesaid do say and present that the said John Wynne, unlawfully, feloniously, wilfully, and of his malice aforethought, him, the said Archibald F. McKinnon, then and there, to wit, upon the high seas, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, in and on board of said vessel, in manner and form aforesaid, did kill and murder, against the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided.

And the jurors aforesaid, upon their oath aforesaid, do further present and say that the said district of Hawaii is the district of the

United States of America into which the said John Wynne was first brought after committing the offense aforesaid.

(Sgd.) ROBT. W. BRECKONS,  
*United States Attorney for the District of Hawaii.*

A true bill.

(Sgd.) J. F. WOODS,  
*Foreman of the Grand Jury.*

161

*Third count.*

And the said grand jurors of the United States, empaneled, sworn, and charged at the term aforesaid of the court aforesaid, on their oath aforesaid, present that John Wynne, late of the district aforesaid, on the twentieth day of September, in the year of our Lord one thousand nine hundred and seven, with force and arms, in a certain haven of the Pacific Ocean, to wit, the harbor of Honolulu, in the District and Territory of Hawaii, and within the jurisdiction of this court and within the admiralty and maritime jurisdiction of the said United States of America, and out of the jurisdiction of any particular State of the said United States of America, in and on board of a certain American vessel, the same being then and there a vessel called and named "Rosecrans," then and there belonging to the "National Oil and Transportation Company," a corporation organized under and by virtue of the laws of the State of California, in and upon one Archibald F. McKinnon, then and there being on board of said vessel, unlawfully, feloniously, wilfully, and of his malice aforethought, did make an assault, and that the said John Wynne then and there, to wit, in a certain haven of the Pacific Ocean, to wit, the harbor of Honolulu, in the District and Territory of Hawaii, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, in and on board of said vessel, with a certain hammer, him, the said Archibald F. McKinnon, in and upon the head of the said Archibald F. McKinnon, unlawfully, feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound, thereby, then and there, to wit, in a certain haven of the

Pacific Ocean, to wit, the harbor of Honolulu, in the District  
 162 and Territory of Hawaii, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, in and on board of said vessel, giving unto the said Archibald F. McKinnon, in and upon the head of the said Archibald F. McKinnon, divers mortal wounds, of which said mortal wounds the said Archibald F. McKinnon then and there, to wit, in a certain haven of the Pacific Ocean, to wit, the harbor of Honolulu, in the District and Territory of Hawaii, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdic-

tion of this court, in and on board of said vessel, instantly died. And so the jurors aforesaid upon their oath aforesaid do say and present that the said John Wynne, unlawfully, feloniously, wilfully, and of his malice aforethought, him, the said Archibald F. McKinnon, then and there, to wit, in a certain haven of the Pacific Ocean, to wit, the harbor of Honolulu, in the District and Territory of Hawaii, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, in and on board of said vessel, in manner and form aforesaid, did kill and murder, against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

And the jurors aforesaid, upon their oath aforesaid, do further present and say that the said District of Hawaii is the district of the United States of America into which the said John Wynne was first brought after committing the offense aforesaid.

(Sgd.) ROBT. W. BRECKONS,

*United States Attorney for the District of Hawaii.*

A true bill.

(Sgd.) J. F. WOODS,

*Foreman of the Grand Jury.*

163

*Fourth count.*

And the said grand jurors of the United States, empaneled, sworn, and charged at the term aforesaid of the court aforesaid, on their oath aforesaid, present that John Wynne, late of the district aforesaid, on the twentieth day of September, in the year of our Lord one thousand nine hundred and seven, with force and arms, in a certain haven of the Pacific Ocean, to wit, in the harbor of Honolulu, in the district and Territory of Hawaii and within the jurisdiction of this court and within the admiralty and maritime jurisdiction of the said United States of America, and out of the jurisdiction of any particular State of the said United States of America, in and on board of a certain American vessel, the same being then and there a vessel called and named "Rosecrans," then and there belonging to the "National Oil and Transportation Company," a corporation organized under and by virtue of the laws of the State of California, in and upon one Archibald F. McKinnon, then and there being on board of said vessel, unlawfully, feloniously, wilfully, and of his malice aforethought, did make an assault, and that the said John Wynne then and there, to wit, in a certain haven of the Pacific Ocean, to wit, the harbor of Honolulu, in the district and Territory of Hawaii, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, in and on board of said vessel, with a certain hammer, him, the said Archibald F. McKinnon, in and upon the head of the said Archibald F. McKinnon, unlawfully, feloniously, wilfully,

and of his malice aforethought, did strike, penetrate, and wound, thereby then and there, to wit, in a certain haven of the Pacific Ocean, to wit, the harbor of Honolulu, in the district and Territory of Hawaii, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, in and on board of said vessel, giving unto the said Archibald F. McKinnon, in and upon the head of the said Archibald F. McKinnon, divers mortal wounds, of which said mortal wounds the said Archibald F. McKinnon then and there, to wit, in a certain haven of the Pacific Ocean, to wit, the harbor of Honolulu, in the district and Territory of Hawaii, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, languished, and thereafter, and on, to wit, the twentieth day of September, in the year of our Lord one thousand nine hundred and seven, at and within the Territory and district of Hawaii, to wit, on the island of Oahu, at and within the said Territory and district of Hawaii, languishing, died. And so the jurors aforesaid, upon their oath aforesaid, do say and present that the said John Wynne, unlawfully, feloniously, wilfully, and of his malice aforethought, him, the said Archibald F. McKinnon, then and there, to wit, in a certain haven of the Pacific Ocean, to wit, the harbor of Honolulu, in the district and Territory of Hawaii, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, in and on board of said vessel, in manner and form aforesaid, did kill and murder, against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

And the jurors aforesaid, upon their oath aforesaid, do further present and say, that the said District of Hawaii is the district of the United States of America into which the said John Wynne was first brought after committing the offense aforesaid.

(Sgd)

ROBT. W. BRECKONS,

*United States Attorney for the District of Hawaii.*

A true bill.

(Sgd.)

J. F. WOODS,

*Foreman of the Grand Jury.*

165

*Fifth count.*

And the said grand jurors of the United States, empaneled, sworn, and charged at the term aforesaid of the court aforesaid, on their oath aforesaid, present that John Wynne, late of the district aforesaid, on the twentieth day of September, in the year of our Lord one thousand nine hundred and seven, with force and arms, in a certain

arm of the Pacific Ocean, to wit, the harbor of Honolulu, in the district and Territory of Hawaii, and within the jurisdiction of this court and within the admiralty and maritime jurisdiction of the said United States of America, and out of the jurisdiction of any particular State of the said United States of America, in and on board of a certain American vessel, the same being then and there a vessel called and named "Rosecrans," then and there belonging to the "National Oil and Transportation Company," a corporation organized under and by virtue of the laws of the State of California, in and upon one Archibald F. McKinnon, then and there being on board of said vessel, unlawfully, feloniously, wilfully, and of his malice aforethought, did make an assault, and that the said John Wynne then and there, to wit, in a certain arm of the Pacific Ocean, to wit, the harbor of Honolulu, in the district and Territory of Hawaii, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, in and on board of said vessel, with a certain hammer, him, the said Archibald F. McKinnon, in and upon the head of the said Archibald F. McKinnon, unlawfully, feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound, thereby then and there, to wit, in a certain arm of the Pacific Ocean, to wit, the harbor of Honolulu, in the district and Territory of Hawaii, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, in and on board of said vessel, giving unto the said Archibald F. McKinnon, in and upon the head of the said Archibald F. McKinnon, divers mortal wounds, of which said mortal wounds the said Archibald F. McKinnon then and there, to wit, in a certain arm of the Pacific Ocean, to wit, the harbor of Honolulu, in the district and Territory of Hawaii, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, in and on board of said vessel, instantly died. And so the jurors aforesaid upon their oath aforesaid do say and present that the said John Wynne, unlawfully, feloniously, wilfully, and of his malice aforethought, him, the said Archibald F. McKinnon, then and there, to wit, in a certain arm of the Pacific Ocean, to wit the harbor of Honolulu, in the district and Territory of Hawaii, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, in and on board of said vessel, in manner and form aforesaid, did kill and murder, against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

And the jurors aforesaid, upon their oath aforesaid, do further present and say, that the said District of Hawaii is the district of the

United States of America into which the said John Wynne was first brought after committing the offense aforesaid.

(Sgd.)

ROBT. W. BRECKONS,

*United States Attorney for the District of Hawaii.*

A true bill.

(Sgd.)

J. F. WOODS,

*Foreman of the Grand Jury.*

And the said grand jurors of the United States, empaneled, sworn, and charged at the term aforesaid of the court aforesaid, on their oath aforesaid, present that John Wynne, late of the district aforesaid, on the twentieth day of September, in the year of our Lord one thousand nine hundred and seven, with force and arms, in a certain arm of the Pacific Ocean, to wit, the harbor of Honolulu, in the District and Territory of Hawaii, and within the jurisdiction of this court and within the admiralty and maritime jurisdiction of the said United States of America, and out of the jurisdiction of any particular State of the said United States of America, in and on board of a certain American vessel, the same being then and there a vessel called and named "Rosecrans," then and there belonging to the "National Oil and Transportation Company," a corporation organized under and by virtue of the laws of the State of California, in and upon one Archibald F. McKinnon, then and there being on board of said vessel, unlawfully, feloniously, wilfully, and of his malice aforethought, did make an assault, and that the said John Wynne then and there, to wit, in a certain arm of the Pacific Ocean, to wit, the harbor of Honolulu, in the District and Territory of Hawaii, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, in and on board of said vessel, with a certain hammer, him, the said Archibald F. McKinnon, in and upon the head of the said Archibald F. McKinnon, unlawfully, feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound, thereby then and there, to wit, in a certain arm of the Pacific Ocean, to wit, the harbor of Honolulu, in the District and Territory of Hawaii, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, in and on board of said vessel, giving unto the said Archibald F. McKinnon, in and upon the head of the said Archibald F. McKinnon, divers mortal wounds, of which said mortal wounds the said Archibald F. McKinnon, then and there, to wit, in a certain arm of the Pacific Ocean, to wit, the harbor of Honolulu, in the District and Territory of Hawaii, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, lan-



guished, and thereafter, and on, to wit, the twentieth day of September, in the year of our Lord one thousand nine hundred and seven, at and within the Territory and District of Hawaii, to wit, on the island of Oahu, at and within the said Territory and District of Hawaii, languishing, died. And so the jurors aforesaid, upon their oath aforesaid, do say and present that the said John Wynne, unlawfully, feloniously, wilfully, and of his malice aforethought, him, the said Archibald F. McKinnon, then and there, to wit, in a certain arm of the Pacific Ocean, to wit, the harbor of Honolulu, in the District and Territory of Hawaii, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, in and on board of said vessel, in manner and form aforesaid, did kill and murder; against the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided.

And the jurors aforesaid, upon their oath aforesaid, do further present and say that the said District of Hawaii is the district of the United States of America into which the said John Wynne was first brought after committing the offense aforesaid.

169 (Sgd.) ROBT. W. BRECKONS,  
*United States Attorney for the District of Hawaii.*

A true bill.

(Sgd.) J. F. WOODS,  
*Foreman of the Grand Jury.*

(Endorsed:) No. 366. United States District Court, District of Hawaii. The United States vs. John Wynne, indictment for murder. A true bill, J. F. Woods, foreman grand jury. Filed Oct. 25, 1907. Frank L. Hatch, clerk. By A. E. Murphy, deputy. Robt. W. Breckons, U. S. attorney.

170 That thereafter, on, to wit, December 2, 1907, the said defendant, John Wynne, filed herein his demurrer to indictment in words and figures as follows, to wit:

In the United States District Court for the District of the Territory of Hawaii, October term, 1907.

UNITED STATES OF AMERICA }  
versus }  
JOHN WYNNE, DEFENDANT. }

*Demurrer to indictment.*

Comes now defendant, John Wynne, by his attorneys, Thompson & Clemons, and demurs to the indictment herein and to the several counts thereof on the grounds following, to wit:

1. As to the "first count" of the said indictment on the ground that the same does not state facts sufficient to constitute any crime

or offense within, under, or against the laws of the United States of America.

2. As to the "second count" of said indictment on the ground that the same does not state facts sufficient to constitute any crime or offense within, under, or against the laws of the United States of America.

3. As to the "third count" of said indictment on the ground that the same does not state facts sufficient to constitute any crime or offense within, under, or against the laws of the United States of America.

171 4. As to the "fourth count" of said indictment on the ground that the same does not state facts sufficient to constitute any crime or offense within, under, or against the laws of the United States of America;

5. As to the "fifth count" of said indictment on the ground that the same does not state facts sufficient to constitute any crime or offense within, under, or against the laws of the United States of America;

6. As to the "sixth count" of said indictment on the ground that the same does not state facts sufficient to constitute any crime or offense within, under, or against the laws of the United States of America;

7. As to said indictment as a whole, on the ground that the several counts thereof are inconsistent with each other;

8. As to the indictment as a whole, on the ground of variance between the several counts thereof.

Wherefore defendant prays that he be hence dismissed.

(Sig.) JOHN WYNNE, Defendant, by his attorneys,  
(Sig.) THOMPSON & CLEMONS.

HONOLULU, December 2, 1907.

That thereafter, on, to wit December 14, 1907, the said demurrer came regularly on for hearing before the Honorable Sanford B. Dole, judge of said court, and was then and there submitted for determination, whereupon, to wit, on said day, the judge afore-  
172 said overruled the said demurrer, and it was thereupon ordered that the said demurrer be overruled.

#### *Exception 1.*

And that to said ruling and order of the court the defendant then and there duly noted an exception and the said exception was duly allowed.

#### *Exception 2.*

And that to the said ruling and order of the court overruling said demurrer and refusing to sustain the same on ground numbered "3" thereof, to wit, that "the 'third count' of said indictment does not state facts sufficient to constitute any crime or offense within,

under, or against the laws of the United States of America," the defendant then and there duly noted an exception, and the said exception was duly allowed.

*Exception 3.*

And that to the said ruling and order of the court overruling said demurrer and refusing to sustain the same on ground numbered "4" thereof, to wit, that "the 'fourth count' of said indictment does not state facts sufficient to constitute any crime or offense within, under, or against the laws of the United States of America," the defendant then and there duly noted an exception, and the said exception was duly allowed.

*Exception 4.*

And that to the said ruling and order of the court overruling said demurrer and refusing to sustain the same on ground numbered "5" thereof, to wit, that "the 'fifth count' of said indictment does not state facts sufficient to constitute any crime or offense within, under, or against the laws of the United States of America," the defendant then and there duly noted an exception, and the said exception was duly allowed.

*Exception 5.*

And that to the said ruling and order of the court overruling said demurrer and refusing to sustain the same on ground numbered "6" thereof, to wit, that "the 'sixth count' of said indictment does not state facts sufficient to constitute any crime or offense within, under, or against the laws of the United States of America," the defendant then and there duly noted an exception, and the said exception was duly allowed.

174

*Exception 6.*

And that to the said ruling and order of the court overruling said demurrer and refusing to sustain the same on ground numbered "7" thereof, to wit, "that the several counts of said indictment are inconsistent with each other," the defendant then and there duly noted an exception, and the said exception was duly allowed.

*Exception 7.*

And that to the said ruling and order of the court overruling said demurrer and refusing to sustain the same on ground numbered "8" thereof, to wit, that of "variance between the several counts" of said indictment, the defendant then and there duly noted an exception, and the said exception was duly allowed.

175 That thereafter, on, to wit, December 18, 1907, the said defendant, John Wynne, filed herein his motion to compel election in words and figures as follows, to wit:

In the United States District Court, Territory of Hawaii, October term, 1907.

UNITED STATES OF AMERICA, }  
*vs.*  
 JOHN WYNNE, DEFENDANT. }

*Motion to compel election.*

Comes now defendant, John Wynne, in his own proper person and moves the court now here for an order requiring the United States of America to elect upon which count, if any, of the indictment in the above entitled matter it proposes to proceed to trial and ask for a conviction of the defendant as charged.

This motion is upon the grounds that the said defendant, John Wynne, can not safely or intelligently proceed to plead, go to trial, or proceed at all upon the said indictment for the reason that the several counts thereof differ essentially as to the place the said alleged homicide was committed.

All the papers, pleadings, the record of the court herein, 176 the clerk's minutes, and the affidavit of John Wynne hereto attached, are referred to and made a part hereof as fully to all intents and purposes as if the same were herein specifically set out.

(Sig.) JOHN WYNNE, *Defendant.*

(Sig.) THOMPSON & CLEMONS,  
*Attorneys for defendant.*

In the United States District Court, Territory of Hawaii, October term, 1907.

UNITED STATES OF AMERICA }  
*vs.*  
 JOHN WYNNE, DEFENDANT. }

UNITED STATES OF AMERICA,  
*Territory of Hawaii, County of Oahu, ss:*

JOHN WYNNE, defendant herein, being first duly sworn deposes and says that he has heard the indictment herein read and is generally familiar with the contents thereof; that he is informed by his counsel herein that he cannot safely plead, go to trial, or proceed upon the charges contained in said indictment as the same now stand, for the reason that the several counts thereof as therein laid differ 177 essentially as to the place of the alleged homicide committed as therein alleged.

(Sig.) JOHN WYNNE.

Subscribed and sworn to before me this 18th day of December, A. D. 1907.

[SEAL.]

(Sig.) F. L. HATCH,  
*Notary Public, First Judicial Circuit,  
 County of Oahu, Territory of Hawaii.*

That thereafter the said motion to compel election came regularly on for hearing before the judge aforesaid, and was by him taken under advisement, and thereafter, on to wit, January 25th, 1908, the judge aforesaid filed herein his ruling on motion to compel election, in words and figures as follows, to wit:

In the United States District Court for the Territory of Hawaii,  
October A. D., 1908 term.

THE UNITED STATES OF AMERICA,	} No. 366. Indictment for murder.
plaintiff,	
vs.	
JOHN WYNNE, DEFENDANT.	

*Ruling on motion to compel election.*

178 The defendant has moved that the court require the prosecution to elect upon which court, if any, in the indictment in this case, it proposes to proceed to trial, on the ground that the defendant cannot safely or intelligently proceed to plea and go to trial upon the indictment because the several counts differ essentially as to the place where the alleged homicide was committed.

The indictment contains six counts, two of which allege the homicide to have been committed on the high seas, two that it was committed "in a certain haven of the Pacific Ocean, to wit, the harbor of Honolulu," and two that it was committed "in a certain arm of the Pacific Ocean, to wit, the Harbor of Honolulu." There are other differences between the counts which, however, are not brought up under this motion.

As to the description of the locality, I find that the last four counts substantially describe the same place, in that a haven of the Pacific Ocean, to wit, the harbor of Honolulu, and a certain arm of the Pacific Ocean, to wit, the harbor of Honolulu, describe the same locality. I consider that it is due to the defendant that he be tried upon the charge of having committed the offense at only one of these localities, and will, therefore, allow the motion so far as to require the prosecution to elect whether it will proceed upon the first two counts of the indictment, or upon the last four.

(Sig.)                      SANFORD B. DOLE,  
Judge, U. S. District Court.

JANUARY 25, 1908.

179 That thereafter, on, to wit, February 24, 1908, the said cause came regularly on for arraignment and plea of the said defendant, John Wynne, when Robert W. Breckons, esq., United States district attorney, in behalf of the United States of America, announced in open court that the prosecution elected to proceed to trial on the last four counts of the indictment herein; and thereupon the said defendant, John Wynne, was asked what his plea was to said indict-

ment, whereupon the said defendant John Wynne entered a plea of "Not guilty."

That thereafter, on, to wit, October 22, 1908, the said cause came regularly on for trial before the judge aforesaid and a jury. Present, W. T. Rawlins, esq., assistant United States district attorney, attorney for the said plaintiff the United States of America, and F. E. Thompson, esq., attorney for the defendant John Wynne, and that before the drawing of a jury the following proceedings were had, to wit:

Mr. Rawlins here asked that the name of Mr. W. L. Whitney be entered as counsel to assist the prosecution in this case (Mr. Whitney being deputy attorney-general of the Territory of Hawaii but not an officer of the United States of America). Mr. Thompson objected to Mr. Whitney's being allowed to so assist, he not being a regularly deputized officer of the United States and not authorized by law to  
180 appear for the United States. The court, after hearing argument from counsel on both sides ruled that Mr. Whitney could not take the place of an official prosecutor and could not sign documents for the Government, but that he might appear as assistant to Mr. Rawlins in the conduct of the case.

*Exception 8.*

And that to said ruling the defendant by his attorneys then and there duly noted an exception and the said exception was duly allowed. And that thereafter throughout the trial of said cause the said W. L. Whitney was permitted, over the defendant's objections, to take an active part in said trial and proceedings and to argue questions as to the admissibility of evidence and questions as to instructions to the jury.

That thereafter a jury of twelve men was duly empaneled and sworn to try the said cause; and thereafter, on, to wit, October 26, 1908, in the course of the direct examination by Mr. Rawlins, United States attorney aforesaid, of James Reed, a witness called in behalf of the plaintiff, the following question was asked by Mr. Rawlins, attorney for the plaintiff, to wit:

Q. What flag does the steamer "Rosecrans" fly?

Whereupon the following proceedings were had, to wit:

Mr. THOMPSON. Objected to, as if it is to prove registration it is not the best evidence of registration; she might fly any flag. (Argues.)

Mr. RAWLINS. (Argues.) We don't contend that the vessel flying the flag alone, would go to show the registry of the vessel, but  
181 it is merely a circumstance to that effect.

Mr. THOMPSON. If that is a circumstance I am willing to let it go in as a circumstance, but if it is to prove the registration I object to it. If produced to show her registration it is incompetent, if for any corroboration there is nothing to corroborate at present; therefore it is not evidence at this time. It is incompetent as not being the best evidence, which is the registry; it is immaterial for any other purpose.

The Court. Overrule the objection.



*Exception 9.*

And that to said ruling the defendant, by his attorneys, then and there duly noted an exception, and the said exception was duly allowed; and the said witness thereupon answered the said question as follows, to wit:

A. The American flag.

182 That thereafter in the course of the direct examination by

Mr. Rawlins, United States attorney aforesaid, of Captain Holmes, a witness called in behalf of the plaintiff, the following question was asked, to wit:

Q. What flag does the steamship "Rosecrans" fly?

Whereupon the defendant by his attorney objected to said question as immaterial and not the best evidence of registration, and the court overruled the said objection.

*Exception 10.*

And that to said ruling and order the defendant by his attorney then and there duly noted an exception, and the said exception was duly allowed.

183 That immediately thereafter in the course of said direct examination of Captain Holmes, the following question was asked by Mr. Rawlins, attorney for the plaintiff, to wit:

Q. Answer the question, please, what flag does she fly?

Whereupon the said witness, Captain Holmes, answered, to wit:

A. American flag.

Whereupon the defendant by his attorney moved that the said answer be stricken out on the same grounds as last aforesaid, namely as being immaterial and not the best evidence of registration; and the court denied the said motion.

*Exception 11.*

And that to said ruling and order the defendant, by his attorney, then and there duly noted an exception, and the said exception was duly allowed.

That immediately thereafter in the course of said direct examination of Captain Holmes by Mr. Rawlins, United States attorney aforesaid, the following proceedings were had, to wit:

Mr. RAWLINS. Q. Do you know where she is enrolled? (Referring to the said ship "Rosecrans.")

Mr. THOMPSON. Object to it as not the best evidence of enrollment.

184 Mr. RAWLINS. Q. I will ask you where the steamship "Rosecrans" is at the present time?

A. When I left she was in San Francisco Bay, but I heard—

Mr. THOMPSON. Object to that—

Mr. RAWLINS. Q. When was it you last saw her?

A. Tuesday a week ago, last Tuesday—last Tuesday.

Q. She was still in San Francisco?

A. Yes.

Q. I will ask you if you are familiar with the enrollment papers of the steamship "Rosecrans?"

A. Yes, sir.

Q. And where are they, captain?

A. They have got to be kept aboard the ship.

Q. I will ask you if you are familiar with the signature of the deputy collector of customs in San Francisco, Farley?

A. Yes, sir; I have seen his signature several times on licenses, and so on.

Q. Are you familiar with the seal of the department of customs, in San Francisco?

A. Yes, sir.

Q. Are you familiar with the enrollment papers aboard the steamship "Rosecrans?"

A. Yes, sir.

Mr. THOMPSON. I would like to cross-examine on that: Q. You have seen Mr. Farley write several times—how many times?

A. I have never seen Farley write his signature himself.

Q. Then you don't know anything about his writing from having seen him write?

A. No, sir.

Mr. RAWLINS. Q. You say you are familiar with his signature, captain; where have you seen his signature?

A. Well, his signature appears in all the licenses aboard the vessel, in the chart rooms and pilot house, all the licenses issued yearly to the ship, and we have occasion lots of times to see them, quite often.

Q. And have you ever received these licenses yourself, from the custom-house?

A. Yes, sir.

Q. And when they were handed to you I will ask you if the signature of Farley appeared on them?

Mr. THOMPSON. Object to that as being a conclusion; the question is whether or not it is the signature of Farley. The way to prove handwriting is by someone who is familiar with the handwriting, who has seen them write. Submit they cannot prove handwriting by hearsay.

The COURT. Q. For how long a time have you been acquainted with the signature?

A. Well, I have seen it appear, as I say, on the licenses on the ship; there is a license issued to the ship to run so long, for one year, and I have seen the signature on that.

Q. Well, you were on the ship as master a short time, and you were on board as second mate for two or three years?

A. I was second mate first, and then I was mate.

Q. Well, during that time as second mate—

A. It was hanging right in the ship's chart room, and there is where I seen it.

Q. You have seen it from time to time?

A. Yes.

186 Whereupon, both sides desiring to present authorities on the point raised by the aforesaid objection of Mr. Thompson, attorney for defendant, and the following day, Tuesday, November 3rd, 1908, being election day and some of the jurors being inspectors of election, the court excused the jury until Wednesday, November 4th, 1908, and adjourned court to said Tuesday, November 3rd, when counsel for both sides argued and presented to the court authorities concerning the point raised by the aforesaid objection of Mr. Thompson, attorney for defendant, as to the attempt of counsel for the United States to prove the signature of Mr. Farley aforesaid by the said witness Captain Holmes; and after hearing and considering the argument and authorities aforesaid, the court reserved its decision until the following day, Wednesday, November 4th, 1908, when the court then and there overruled the defendant's said objection.

*Exception 12.*

And that to said ruling and order the defendant by his attorney then and there duly noted an exception, and the said exception was duly allowed.

187 And that immediately thereafter, the said Captain Holmes, witness for plaintiff, was recalled for continued direct examination by Mr. Rawlins, United States attorney aforesaid, when the following proceedings were had to wit:

Mr. RAWLINS. We offer this in evidence at this time, and ask that it be received in evidence. (Showing document containing disputed signature of Farley.)

Mr. THOMPSON. We object on the following grounds: First, that there is no proof that it came from the office of the collector of customs of the district and port of San Francisco, or from any other office which is the legal custodian of the document; second, on the grounds that it does not appear that N. S. Farley is the deputy collector of customs of the port of San Francisco, or holds any other official position; third, that the document purporting to be a copy of a certificate of enrollment is not authenticated as required by statute; fourth, that there is no proof that the purported copy is a copy of the document sought to be proven, except that it is marked "Copy," and that it is certified to by N. S. Farley as being a true copy; fifth, that there is no proof that the certificate of enrollment sought to be introduced is at present in force; sixth, on the ground that it affirmatively appears from the purported certificate of enrollment, that it has been signed not by N. S. Farley, but by N. S. Farley through the medium of some one else who initials himself "W"; seventh, that there is no proof that the witness here, who has testified in  
188 regard to the signature of N. S. Farley, knows the signature of N. S. Farley except as it is signed by one who signs himself by the initial "W;" eighth, that there is no proof that the signature

N. S. Farley, deputy collector of customs, is in reality the signature of N. S. Farley; ninth, that there is no evidence as to the purported seal on the copy of certificate sought to be introduced being the seal of any department of the Government.

The COURT. This is not purported to be signed by Farley, but by W. J. Coey, acting collector; the certificate is signed by Farley?

Mr. RAWLINS. Yes; the certificate.

The COURT. The objections are overruled.

*Exception 13.*

And that to said ruling and order the defendant by his attorney, then and there duly noted an exception, and the said exception was duly allowed.

And immediately thereafter said document was received in evidence and marked "Government's Exhibit 2;" and that a copy of said document with indorsements is in words and figures as follows, to wit:

180

(Copy.)

Permanent certificate No. 280.

Official number.

Numerals  
127310.

Letters  
K. N. T. C.

The United States of America.

Iron.

(Vignette.)

Sec. 4319, Rev. Stats.

Cat. No. 1271.

Certificate of enrollment.

In conformity to Title L, "Regulations of vessels in domestic commerce," of the Revised Statutes of the United States.

<sup>2</sup> George F. Cameron, of San Rafael, California, secretary, having taken and subscribed the oath required by law, and having <sup>3</sup> sworn that <sup>4</sup> the "National Oil and Transportation Company," of San Francisco, a corporation organized under the laws of the State of California, is <sup>5</sup> the sole owner of the vessel called the "Rosecrans," of San Francisco, whereof P. Johnson, a citizen of the United States, is master, and that the said vessel was built in the year 1883, at <sup>6</sup> Glasgow, Scotland, of <sup>11</sup> iron, as appears by <sup>7</sup> P. E. No. 229 issued at this port April 27/05. Now surrendered. New owner and <sup>8</sup> said enrollment having certified that the said vessel is a screw seamer; that she has three decks, two masts, plain head, round stern; that her length is 326.4 feet, her breadth 38.2 feet, her depth 21 feet, her height feet; that she measures as follows:

Rebuilt at  
in 190 ; remeasured at

	Tons.	100ths.
Capacity under tonnage deck.....	2, 763	70
Capacity between decks above tonnage deck.....		
Capacity of inclosures on the upper deck, viz.....	212	48
Gross tonnage.....	2, 976	
'Deductions under section 4153, Revised Statutes, as amended by act of March 2, 1895:		
190 Crew space, 208; master's cabin, steering gear, anchor gear, boatswain's stores, chart house, donkey engine and boiler.....	208	
Storage of sails; propelling power, 952.....	952	
Total deductions.....	1, 160	1, 160
Net tonnage.....		1, 816

that the following described spaces, and no others have been omitted,  
viz, and <sup>10</sup> said vessel has been duly enrolled at  
the port of San Francisco.

Given under my hand and seal at the port of San Francisco, in the  
district of San Francisco, this 20<sup>th</sup> day of June, in the year one thou-  
sand nine hundred and five (1905).

W. J. COEY,  
*Acting Deputy Collector of Customs,*  
W.

E. W. MASLIN,  
*Deputy Naval Officer.*

1. Insert word "Permanent" or "Temporary" as required.
2. Insert name and address of the one who swore or affirmed.
3. "Sworn" or "affirmed."
4. If there be only one owner, insert "he" or "she;" if more than one owner,  
add word "owning" after "he" or "she," cite part owned, then insert names  
of other owners, their shares and addresses.
5. If corporated company he sole owner, strike out words "citizen of the  
United States and"
6. See Regulations regarding the documentation of different classes of vessels.
7. Here describe previous document, etc.
8. Insert "said register," "said enrollment," or "said license." In every  
original enrollment cite name and title of measurer of vessel.
9. Deductions to be made only as authorized by law.
10. In every original enrollment insert words "the said" having  
agreed to the description and measurement above specified."
11. State material of which built, as "wood," "iron," "steel," "composite."

Indorsements of change of master.

District of \_\_\_\_\_, port of \_\_\_\_\_,

\_\_\_\_\_, <sup>1</sup> having taken the oath required by law, is at present  
master of the within named vessel, in lieu of \_\_\_\_\_, late master.

*Collector of Customs.*

191                  District of \_\_\_\_\_ , Port of \_\_\_\_\_ ,  
\_\_\_\_\_, 1 \_\_\_\_\_.  
\_\_\_\_\_ , having taken the oath required by law, is at present  
master of the within-named vessel, in lieu of \_\_\_\_\_ , late master.

*Collector of Customs.*

District of \_\_\_\_\_, Port of \_\_\_\_\_, 1, \_\_\_\_\_, having taken the oath required by law, is at present master of the within-named vessel, in lieu of \_\_\_\_\_, late master.

*Collector of Customs.*

# 44, fee 20c.

Cat. No. 1271.

**Permanent.**

Department of Commerce and Labor.

(Copy.)

### Certificate of enrollment.

(Iron.) No. 280, of the screw steamer called the "Rosecrans," of San Francisco, of 2,976 gross. 1,816 net tons. Issued at the port of San Francisco, district of San Francisco, June 20th, 1905.

DISTRICT AND PORT OF SAN FRANCISCO.

I hereby certify the within to be a true copy of the original issued by this office.

Given under my hand and seal this 5 day of October, 1907.

(Sgd.) N. S. FARLEY, [SEAL.]  
Deputy Collector of Customs.  
W.,  
Collector of Customs.

192                  District of \_\_\_\_\_ , Port of \_\_\_\_\_ ,  
\_\_\_\_\_, having taken the oath required by law, is at present  
master of the within-named vessel, in lieu of \_\_\_\_\_ , late master.

*Collector of Customs.*

District of , Port of ,  
1, .

, having taken the oath required by law, is at present  
master of the within-named vessel, in lieu of , late master.

*Collector of Customs.*

District of , Port of ,  
1, .

, having taken the oath required by law, is at present  
master of the within-named vessel, in lieu of , late master.

*Collector of Customs.*

District of , Port of ,  
1, .

, having taken the oath required by law, is at present  
master of the within-named vessel, in lieu of , late master.

*Collector of Customs.*

District of , Port of ,  
1, .

, having taken the oath required by law, is at present  
master of the within-named vessel, in lieu of , late master.

*Collector of Customs.*

District of , Port of ,  
1, .

, having taken the oath required by law, is at present  
master of the within-named vessel, in lieu of , late master.

*Collector of Customs.*

193

District of , Port of ,  
1, .

, having taken the oath required by law, is at present  
master of the within-named vessel, in lieu of , late master.

*Collector of Customs.*

(Across the face:) Filed Nov. 4, 1908, at o'clock and min-  
utes M. (Sig.) Frank L. Hatch, clerk, by (Sig.) A. E. Murphy,



deputy clerk. # 366, U. S. vs. John Wynne. Exhibit 2, U. S. Cashier's Custom-house. B. Paid. H. Oct. 5, 1907, San Francisco.

194 And immediately thereupon the following proceedings were had, to wit:

Mr. THOMPSON. Now, I move to strike out the certificate, on the grounds urged in the original objection, and further that it now appears upon the reading of it that it is a purported copy of an original, the absence of which is not explained and not accounted for, and is, therefore, secondary.

The COURT. The motion is denied.

*Exception 14.*

And that to said ruling and order the defendant, by his attorney, then and there duly excepted and the said exception was duly allowed.

That thereafter, in the course of said direct examination of Captain Holmes by Mr. Rawlins, United States attorney aforesaid, the following proceedings were had, to wit:

Q. Who is, or who are, the owners of the steamship "Rosecrans?"

Mr. THOMPSON. Objected to; the best evidence of the ownership is the title. There must be a bill of sale or something to show the ownership; if there is, he certainly can't testify to it.

The COURT. Don't the enrollment show it?

Mr. RAWLINS. Yes; but you may show by reputation who the owner is.

Mr. THOMPSON. Then, if it is merely cumulative, it is immaterial, in addition to the other objection. If the enrollment is sufficient it is immaterial; if it is insufficient, then the testimony is incompetent. (Argues.)

Mr. RAWLINS. (Argues.)

The COURT. This is a not a contest for the title of the ship, and I will overrule the objection, seeing that this man is an employee and has long been an employee of the vessel.

*Exception 15.*

And that to said ruling and order the defendant, by his attorney, then and there duly noted an exception and the said exception was duly allowed.

And immediately thereupon the said witness, Captain Holmes, in answer to the question last aforesaid, replied, to wit:

A. Well, all I go by is the ship's papers—National Oil and Transportation Company.

And immediately thereupon the following proceedings were had, to wit:

Mr. THOMPSON. Move it be stricken out now, it being clearly hearsay. Out of his own mouth he has shown he is incompetent to answer it, because he goes right back to the enrollment.

Mr. RAWLINS. (Argues.)

The COURT. It is of no additional value; as evidence it don't add anything. I will allow the motion.

Mr. THOMPSON. May the jury be instructed to disregard it?

196 The COURT. Yes; that answer is out of the case.

Mr. RAWLINS. Q. What is the reputation relative, if you know, relative to the nature of this National Oil and Transportation Company being a corporation or a copartnership, and where organized?

Mr. THOMPSON. Objected to as immaterial.

The COURT. I ruled that the issue here was not the ownership of the vessel, but was something very different. It is a collateral matter of very little importance.

Mr. THOMPSON. Object to it on the same grounds that Mr. Rawlins objected to my question on.

The COURT. The question is, having been alleged, whether it must be proved.

Mr. RAWLINS. (Argues.)

The COURT. I will sustain the objection.

Mr. RAWLINS. If the court please, on that matter of proof of reputation, we have here a case which, with the permission of the court, we would like to cite.

The COURT. You mean you would like to reopen the question?

Mr. RAWLINS. Yes, with the court's permission.

Mr. THOMPSON. No objection.

The COURT. Then you may do so.

(Mr. Whitney and Mr. Rawlins here argued and cited cases, and Mr. Thompson argued in reply.)

The COURT. I don't care to rule on the question of immateriality. My impression is that this is immaterial, but I don't rule on that and therefore I think I will admit this testimony, for I presume that is the law. It is merely the de facto status of the corporation,  
197 and whatever the question may be as to its immateriality, I will not rule directly on this point at this time.

#### *Exception 16.*

And that to said ruling and order of the court, the defendant, by his attorney, then and there duly noted an exception, and the said exception was duly allowed.

That thereafter on, to wit, November 9th, 1908, both parties having rested, and the said cause being ready to go to the jury, the defendant presented to said court his motion for directed verdict, in words and figures as follows, to wit:

United States District Court for the Territory of Hawaii.

UNITED STATES OF AMERICA }  
                                   *vs.* }  
 JOHN WYNNE, DEFENDANT. }

*Motion for directed verdict.*

Comes now the defendant, John Wynne, in his own proper person, and moves for a directed verdict on the grounds following, to wit:

1. That this court is without jurisdiction to try the defendant for any act set forth in the indictment herein.

2. That there is no evidence or proof herein that the act or acts charged against the defendant in said indictment was or were committed on the "high seas."

3. That the evidence herein is only that the act or acts charged in said indictment against the defendant was or were committed  
 198 on a vessel moored at and tied to a wharf in the harbor of Honolulu, and not on the "high sea" or "high seas."

4. That there is no evidence or proof herein that the ship "Rosecrans," named in said indictment, was at the time of the act or acts charged an American vessel.

5. That there is no evidence or proof herein of the nationality of said vessel.

6. That there is no proof or evidence, or anything to show, that the act or acts charged against the defendant were committed outside of any State as State is defined by or known to the law.

7. That the proof or evidence shows that the act or acts here charged were committed in the Territory of Hawaii and within a State as the term "State" is known to the law.

8. That the statute upon which the indictment herein is predicated, to wit, Revised Statutes of the United States, section 5339, is unconstitutional and void.

(Sig.)            JOHN WYNNE,  
                           *Defendant above named.*

Honolulu, Hawaii, November 9th, 1908.

That thereupon the said court then and there denied the said motion for directed verdict.

*Exception 17.*

199        And that to said ruling and order of the court the defendant, by his attorney, then and there duly noted an exception and the said exception was duly allowed.

*Exception 18.*

And that to said ruling and order of the court overruling and denying the said motion for directed verdict, and refusing to grant

the same motion on ground numbered "1" thereof, to wit, that "this court is without jurisdiction to try the defendant for any act set forth in the indictment herein," the defendant then and there duly noted an exception and the said exception was duly allowed. And in this connection the defendant shows that the only evidence in said case relating to the point of jurisdiction is that set forth and referred to under exceptions numbered "19" and "20" of this bill of exceptions.

*Exception 19.*

And that to said ruling and order of the court overruling and denying the said motion for directed verdict, and refusing to grant the same on ground numbered "2" thereof, to wit, that "there is no evidence or proof herein that the act or acts charged against the defendant in said indictment was or were committed on the 'high seas,'" the defendant then and there duly noted an exception and the said exception was duly allowed.

And in this connection the defendant shows that the only evidence in said cause as to where the said act or acts was or were committed was that the same was or were committed on the steamship "Rosecrans," and as testified to on direct examination by James Reed, a witness produced and sworn in behalf of the plaintiff, the United States of America, that the said ship was at the time in question "lying down at the oil wharf" in Honolulu aforesaid, and the said James Reed on cross-examination also testified, as shown by the following proceedings, to wit:

Q. By Mr. THOMPSON. Where was she lying on September 20th—the "Rosecrans?"

A. Lying down at the oil wharf, the railroad dock.

Q. She was connected with the oil tanks, was she not, by hose?

A. Yes, sir.

Q. By the railroad dock you mean the Oahu Railway & Land Company's dock, do you?

A. Yes, sir; I think that is the name.

Q. How was she headed, was she bow in or stern in?

A. Bow in.

Q. And on which side of the railroad dock was she, do you know; was she on the side nearest the town, nearest the mountains, or the side nearest Waikiki?

A. The side nearest Hackfeld's dock.

Q. That is, she was across the slip from Hackfeld's dock, was she?

A. Yes, sir.

Q. She was then in that slip formed by Hackfeld's dock and the oil—the Oahu Railway & Land Co.'s—dock?

A. Yes, sir.

Q. Was she away down the slip, so she was completely in it, or was her stern extending out beyond it?

A. She was lying as far up as she could get, and then we had to lay off from the dock about six feet.

Q. In order to get—

A. The doctor wouldn't allow us to come any nearer than six feet from the dock.

Q. You were within six feet of the dock in the slip, and away up to the end of the slip?

A. Yes, sir.

And that the testimony of C. Madeson, a witness produced and sworn in behalf of the plaintiff, United States of America, was, on direct examination, that the said ship "Rosecrans" then lay "along-side railroad wharf No. 1."

And that the testimony of Captain Holmes, a witness produced and sworn in behalf of the plaintiff, United States of America, was, on direct examination, as follows, to wit:

202 By Mr. RAWLINS. Q. At the time these occurrences happened aboard the "Rosecrans," I will ask you whether she was afloat or not?

A. She was afloat; yes, sir.

Q. At what place?

A. Down in this harbor.

Q. What harbor do you mean?

A. Honolulu Harbor.

Q. Honolulu Harbor?

A. Yes, sir.

Q. What was her position at the dock, Captain?

A. Lying port side to the dock.

Q. Was she up against the dock or away from it?

A. Fast to the dock; yes, sir.

The COURT. The question is whether she was close to the dock or away from it?

A. Well, the orders is to have the ship rest about six feet from the dock, which she was.

Q. Had those orders been carried out on this occasion?

A. No doubt they had; if she had been slackened in during the evening I didn't notice it.

Mr. RAWLINS. Q. Your answer is that as to whether or not she had been drawn in to the wharf during the evening you don't know?

A. No; we had lines on the other side of the dock and they may have been slackened in to get her a little closer; the ropes is getting kind of short and at times we have to slack her in; which I didn't notice.

203 Q. When this defendant was taken from the steamship "Rosecrans" do you know where he was taken to?

A. I saw him go up the dock in the hands of a policeman.

Q. Where was this dock located; what place?

A. In Honolulu; # 2 railroad wharf.

Q. In the island of Oahu, Territory of Hawaii?

A. Yes, sir.

And that the testimony of said Captain Holmes, a witness produced and sworn as aforesaid, was, on cross-examination, as follows, to wit:

By Mr. THOMPSON. Q. She was lying in the railroad wharf slip, was she?

A. Alongside of the railroad wharf # 2.

Q. Was she—how far up from the end of the slip, Waikiki end of the slip, was she?

A. Not more than probably ten feet—the masts were nearly—the upper berth, and got to go as far as the water allowed us.

Q. About ten feet from the end of the bulkhead?

A. Yes.

Q. How long is that slip; do you know?

A. I don't know.

Q. How long is your ship?

A. 327 feet, I believe.

Q. Well, we can get it from here—and she was within about ten feet of the upper bulkhead, was she?

A. Her bow was about that far.

204 Q. Well, then, how much distance was there astern from the stern of the ship to the end of the dock?

A. I couldn't tell you; haven't got an idea.

Q. Well, was she fifty feet?

A. Oh, yes, over three hundred feet.

Q. Then on this side in the railroad warehouse, this is on the sea side, am I right? (Showing.)

A. On the sea side is the sugar houses of the O. R. & L. Not on the same dock as we were lying.

Q. You were lying on the side towards the sea, were you not?

A. On this side.

Q. On the side towards the mountains, of the slip, were you?

A. Yes, sir.

Q. And you were attached to the dock by a hose, were you not?

A. By a rope; a hose also.

Q. The hose was the means by which you were handling the oil?

A. Yes.

Q. And you mean the hull of the ship was about six feet away from the dock itself, but she was attached to the dock by a hose, am I right?

A. Yes, sir, and of course tied up with lines, of course.

Q. You know nothing about the harbor lines in Honolulu, do you?

A. What do you mean by harbor lines?

Q. The harbor lines as laid out by the United States Government?

A. All I know is the chart, to come in and out of the place.

Q. But when you said she was in the harbor of Honolulu, you don't attempt to testify that she was within the prescribed harbor lines as laid out by the United States Government?

A. That is something I don't know.

Q. Then, as a matter of fact, she was in the slip which leads into the main harbor of Honolulu, is that what you meant?

205 A. She is in what I called the harbor of Honolulu; I don't know about slips.

Q. Was she in a slip, or wasn't she?

A. Inside the dock.

Q. Was she in a slip?

A. No slip there; a dock on one side and a dock on the other.

Q. What is a slip?

A. A slip is a lot of different things--a ferry slip.

Q. What is a ferry slip?

A. A place where you have just room enough for that special vessel to get in.

Q. Then if there is room for more than one vessel it is not a slip?

A. Well, it could be termed a slip, I have heard that several times, but I don't know why this is done.

Q. Now you told us of a ferry slip, with just room for one boat. Tell us of another kind of slip.

A. Another would be between two wharves.

Q. Two wharves with a bulkhead at one end, would that be a slip?

A. It would.

Q. Where you were lying were you between two wharves?

A. Yes.

Q. With a bulkhead at one end?

A. No bulkhead except the ground.

Q. Which would take the place of the bulkhead, would it not?

A. Yes.

Q. Would you call that a slip?

A. Well, it may be termed a slip, that is something--there is lots of different opinion in that regard.

Q. All right; now I don't want to fence with you; you know  
206 the center part of the harbor which is not cut in, do you not?

A. Yes.

Q. Did this hole, surrounded by docks on two sides and with a bulkhead of mud at the other end, form a part of the big circle, or was it off from it?

A. It was off from it.

Q. Is it what you have heard termed a slip?

A. Well, at times I have heard it termed a slip, and at other times not.

Q. What other nautical terms?

A. So far as I am concerned, we call it a dock.

Q. Isn't the dock the wooden portion of it?

A. Yes.

Q. Then what is the water in between?

A. Well, I couldn't tell that; as I say, it would be a slip in the case of a ferry, with room for one ship.

Q. And if room for more than one ship, would it still be a slip?

A. Possibly. I have never got down to technicalities.

Q. It is a dock then, is it?

A. It is a dock, yes.



Q. The water is a dock?

A. The water is floating underneath it.

Q. But the part that is in between the two docks and the bulkhead, is there any term for that?

A. Well, that can be termed a slip.

207 And that the testimony of said Captain Holmes, a witness produced and sworn as aforesaid, was on redirect examination as follows, to wit:

By Mr. RAWLINS. Q. Now this body of water where the "Rosecrans" was resting, between these two docks, with a mud bank at one end, after you came into the channel into Honolulu Harbor did you have to come overland to get to this place, or how did you get there?

A. Through the harbor right in there; didn't go overland there.

Q. From the open sea?

A. From the open sea.

Q. It is connected with the main harbor, from the open sea you enter right into that place, did you, in the same navigable water?

A. Yes.

#### *Exception 20.*

And that to said ruling and order of the court overruling and denying the said motion for directed verdict, and refusing to grant the same on ground numbered "3" thereof, to wit, "that the evidence herein is only that the act or acts charged in said indictment against the defendant was or were committed on a vessel moored at and tied to a wharf in the harbor of Honolulu, and not on the 'high  
208 sea' or 'high seas,'" the defendant then and there duly noted an exception, and the said exception was duly allowed. And in this connection the defendant shows that the only evidence in said cause as to where the said act or acts was or were committed, was the evidence last above set forth under exception numbered "19" of this bill of exceptions.

#### *Exception 21.*

And that to said ruling and order of the court overruling and denying the said motion for directed verdict, and refusing to grant the same on ground numbered "4" thereof, to wit, "that there is no evidence or proof herein that the ship 'Rosecrans,' named in said indictment, was at the time of the act or acts charged an American vessel," the defendant then and there noted an exception and the said exception was duly allowed. And in this connection the defendant shows that the only evidence in said cause as to the nationality of the said ship "Rosecrans" was the testimony of certain witnesses, admitted over the objections and exceptions of the defendant, to the effect that the said ship flew or carried the American flag, and  
209 also the so-called certificate of enrollment admitted in evidence over the objections and exceptions of the defendant and being

"Government's Exhibit 2," aforesaid, and the testimony of said Captain Holmes, a witness produced in behalf of the plaintiff, whose testimony, as a foundation for the admission of said certificate of enrollment of said ship, is as follows:

Mr. RAWLINS. Q. Do you know where she is enrolled? (Referring to the ship "Rosecrans.")

Mr. THOMPSON. Object to it as not the best evidence of enrollment.

Mr. RAWLINS. Q. I will ask you where the steamship "Rosecrans" is at the present time?

A. When I left she was in San Francisco Bay, but I heard——

Mr. THOMPSON. Object to that——

Mr. RAWLINS. Q. When was it you last saw her?

A. Tuesday a week ago; last Tuesday—last Tuesday.

Q. She was still in San Francisco?

A. Yes.

Q. I will ask you if you are familiar with the enrollment papers of the steamship "Rosecrans?"

A. Yes, sir.

Q. And where are they, Captain?

A. They have got to be kept aboard the ship.

Q. I will ask you if you are familiar with the signature of  
210 the deputy collector of customs in San Francisco, Farley?

A. Yes; yes, sir; I have seen his signature several times on licenses, and so on.

Q. Are you familiar with the seal of the department of customs in San Francisco?

A. Yes, sir.

Q. Are you familiar with the enrollment papers aboard the steamship "Rosecrans?"

A. Yes, sir.

Mr. THOMPSON. I would like to cross-examine on that: Q. You have seen Mr. Farley write several times—how many times?

A. I have never seen Farley write his signature himself.

Q. Then you don't know anything about his writing from having seen him write?

A. No, sir.

Mr. RAWLINS. Q. You say you are familiar with his signature, Captain; where have you seen his signature?

A. Well his signature appears in all the licenses aboard the vessel, in the chart rooms and pilot house, all the licenses issued yearly to the ship, and we have occasion lots of times to see them, quite often.

Q. And have you ever received these licenses yourself, from the custom-house?

A. Yes, sir.

Q. And when they were handed to you, I will ask you if the signature of Farley appeared on them?

Mr. THOMPSON. Object to that as being a conclusion; the  
211 question is whether or not it is the signature of Farley. The way to prove handwriting is by some one who is familiar with

the handwriting, who has seen them write. Submit they can not prove handwriting by hearsay.

The COURT. A. For how long a time have you been acquainted with the signature?

A. Well, I have seen it appear, as I say, on the licenses on the ship; there is a license issued to the ship to run so long, for one year, and I have seen the signature on that.

Q. Well, you were on the ship as master for a short time, and you were on board as second mate for two or three years?

A. I was second mate first, and then I was mate.

Q. Well, during that time as second mate—

A. It was hanging right in the ship's chart room, and there is where I have seen it.

Q. You have seen it from time to time?

A. Yes.

And also in this connection, the following testimony was given by the said Captain Holmes, witness for the plaintiff, on cross-examination, to wit:

212 Q. I am going to examine you a little bit, Captain, on this signature of Farley. You have testified that at the various times certificates of enrollment came aboard that they had this signature?

A. Yes, sir.

Q. How many certificates have you seen come aboard?

A. There is only one certificate issued. The licenses I see come aboard every year, license of inspection, and it is hanging up in the chart room, because every year it comes and here stays there until she expires.

Q. As a matter of fact, you have never seen a certificate of enrollment come aboard the ship, it was there when you came there?

A. It was.

Q. And the certificate of enrollment which you did see—did you ever see the certificate of enrollment, after you came aboard?

A. Yes, sir.

Q. And did you notice the signature on it?

A. Yes, sir.

Q. And the signature was—

A. N. S. Farley.

Q. Was it signed N. S. Farley, with a "W" on the bottom of it, like that?

A. No, I never seen that before.

Q. Then, as a matter of fact, this signature here, with the "W" on the bottom, you never saw?

A. I know the particular turn of the "y."

Q. You have never seen it before?

A. I have seen it before, but never noticed it on any signatures on other papers.

Q. So far as that particular part is concerned, you are not  
213 familiar with it?

A. No, sir.

Q. These licenses that came aboard, how many of them have you seen?

A. Well, I have seen one in my own experience.

Q. Only one?

A. Yes.

Q. Then the extent of your familiarity with Farley's; did that one have this "W" on the bottom of it?

A. I never noticed it; never looked close enough for that.

Q. Then, as a matter of fact, you never looked very close at Farley's signature?

A. Not close enough to make any impression about it; all I know is this is Farley, and it is so conspicuous—

Q. The extent of your knowledge of Farley's signature, as I take it, is that you have seen the certificate of enrollment which was there when you came there?

A. Yes.

Q. It was framed, was it?

A. No, sir; this certificate of enrollment was not. The license of inspection was framed.

Q. And you have seen one license of inspection come aboard?

A. Yes; that is, to myself; but I had seen previous to that several of them, during the four years I had been there; they have got to be hanging in the ship's chart room.

Q. And you have seen only one come aboard?

A. Yes, sir.

Q. And they were all signed by Farley, but you had never noticed the "W" on the end of the "Y?"

214 A. No.

Mr. THOMPSON. That's all.

(By a juror, Mr. LUCAS.) Q. Captain, when you arrived in port at San Francisco there, did you have to deposit your papers in the custom-house?

A. Which papers—the manifest or ship's papers?

Q. Ship's papers.

A. No, sir; only the manifest from the place which you sail from, in a home port; in a foreign port you have to do that.

Q. Do you consider Honolulu a home port?

A. Yes, sir; that is an American port.

Then the custom-house has no jurisdiction over your papers in a home port?

A. Oh, yes; we had a temporary license issued here this year—only temporary, though; we had to get our regular license from the place where the ship is registered.

Q. Well, do the custom-house have control of the wharves at all?

A. Down here?

Q. Yes.

A. Well, I guess so; they have control of this part of the place; yes.

215

*Exception 22.*

And to said ruling and order of the court overruling and denying the said motion for directed verdict, and refusing to grant the same on ground numbered "5" thereof, to wit, "that there is no evidence or proof herein of the nationality of said vessel," the "Rosecrans," the defendant then and there duly noted an exception, and the said exception was duly allowed. And in this connection the defendant shows that the only evidence on the question of nationality of said vessel was that admitted over the defendant's objection and  
216 exceptions and more particularly set forth under exceptions numbered "9, 10, 11, 12, 13, 14, 15 and 16," of this bill of exceptions.

*Exception 23.*

And to said ruling and order of the court overruling and denying the said motion for directed verdict, and refusing to grant the same on ground numbered "6" thereof, to wit, "that there is no proof or evidence, or anything to show that the act or acts charged against the defendant was or were committed outside of any State, as State is defined by or known to the law," the defendant then and there duly noted an exception and the said exception was duly allowed. And in this connection the defendant shows that the only evidence in said cause as to where the said act or acts was or were committed, was the evidence above set forth under exceptions numbered "19 and 20" of this bill of exceptions.

*Exception 24.*

And to said ruling and order of the court overruling and denying the said motion for directed verdict, and refusing to grant the  
217 same on ground numbered "7" thereof, to wit, "that the proof or evidence shows that the act or acts herein were committed in the Territory of Hawaii, and within a State, as the term 'State' is known to the law," the defendant then and there duly noted an exception, and the said exception was duly allowed. And in this connection the defendant shows that the only evidence in said cause as to where the said act or acts was or were committed was the evidence above set forth under exceptions numbered "19" and "20" of this bill of exceptions.

*Exception 25.*

And that to said ruling and order of the court overruling and denying the said motion for directed verdict and refusing to grant the said motion on ground numbered "8," thereof, to wit, "that the statute upon which the indictment herein is predicated, to wit, Revised Statutes of the United States, section 5339, is unconstitutional and void," the defendant then and there duly noted an exception and the said exception was duly allowed.

218 That thereupon the defendant presented for allowance his requested instructions to the jury, among which was the following, being defendant's requested instruction No. 5, to wit:

In order to convict this defendant upon the evidence of circumstances it is necessary not only that all of the circumstances concur to show that he committed the crime charged, but also that they are inconsistent with any other rational conclusion. It is not intended that a particular hypothesis explained all the phenomena of circumstantial evidence, nothing must be inferred because, if true, it would account for the facts. Every reasonable hypothesis by which the facts may be explained, consistent with innocence, must, therefore, be vigorously examined and successfully eliminated, and only that no other supposition would reasonably account for all the conditions in the case, can the conclusion of guilt be legitimately adopted. I feel it my duty, in the language of the learned Chief Justice Shaw, to warn you that great care and caution should be exercised by you in drawing inferences from proved facts, because the chief danger to be avoided in dealing with circumstantial evidence arises from the proneness natural to men to jump at conclusions from certain facts without duly averting to other facts which are inconsistent with a hypothesis which the first facts would seem to indicate.

219 The said instruction being directed to certain circumstantial evidence which was offered and admitted in the trial of said cause.

That thereupon the said court refused to give the said instruction as requested.

*Exception 26.*

And that to said ruling and order of the court the defendant then and there duly noted an exception, and the said exception was duly allowed.

That also included among the defendant's requested instructions aforesaid was the following, being defendant's requested instruction No. 9, to wit:

I instruct you that the law presumes the defendant innocent  
220 in this case, and not guilty as charged in the indictment, and the presumption should continue and prevail in the minds of the jury until they are satisfied, beyond all reasonable doubt, of the guilt of the defendant, and acting upon this presumption, the jury should acquit the defendant unless constrained to find him guilty by the evidence convicting him of such guilt beyond all reasonable doubt, and that the presumption of innocence is not a mere form to be disregarded by the jury at pleasure, but it is an essential, substantial part of the law of the land and binding upon the jury in this case; the Supreme Court of the United States has held that the presumption of evidence is evidence created by law in form of the accused, and it is the duty of the jury to give the defendant the full benefit of this presumption of innocence until the proof is adduced which establishes his guilt beyond a reasonable doubt, and, whether the proof



be direct or circumstantial, it must be such as excludes any rational hypothesis of the innocence of the accused. Guilt of a party is not to be inferred because the facts proved are consistent with his guilt, but they must be inconsistent with innocence.

That thereupon, when requested as aforesaid, the said court refused to give the defendant's requested instruction No. 9, aforesaid.

*Exception 27.*

And that to said ruling and order of the court the defendant then and there duly noted an exception, and the said exception was duly allowed.

221 That also, included among the defendant's requested instructions aforesaid was the following, being defendant's requested instruction No. 13, to wit:

I instruct you that malice aforethought is the especial characteristic which distinguishes the crime of murder from other cases of killing a human being; and that malice or mental condition marks the boundary which separates the two crimes of murder and manslaughter.

That thereupon, when requested as aforesaid, the court refused to give the defendant's requested instruction No. 13, aforesaid.

*Exception 28.*

And that to said ruling and order of the court the defendant then and there duly noted an exception, and the said exception was duly allowed.

That thereafter the judge aforesaid, in the course of his charge to the jury, gave as a modification of and in place of defendant's requested instruction No. 13, aforesaid, the following, to wit:

The crime of murder is not defined in the statute and we have to refer to the common law and the decisions of courts therefor, wherein we find that murder is the unlawful killing of any human being by a person of sound memory and discretion, with malice aforethought, expressed or implied. Malice, in this connection, is an intention to do

222 bodily harm—a formed design to do mischief. It includes premeditation. There must therefore be a period of prior consideration, but as to the duration of such period no limit can be arbitrarily assigned. There is not time so short but that within it the human mind can form a deliberate purpose to do an act, and if the intent to do mischief to another is thus formed, after no matter how short a period of reflection, it is none the less malice aforethought. The existence or non-existence of malice is a conclusion to be drawn by the jury from all the facts in the case, and from a careful study of the acts of the defendant and of the circumstances connected with the crime charged. The term malice is here used in a technical sense, and includes not merely hatred and revenge, but every bad, unjustifiable motive. Express malice exists when one with de-



liberate premeditation and design, formed in advance, kills another, such premeditation and design being manifested by external circumstances capable of proof, such as lying in wait, antecedent threats, and concerted schemes to do the party bodily harm.

Malice is implied by the law from any deliberate and cruel act committed by one person against another. Thus, it is implied when one man kills another without provocation, or where the provocation is not great; for no person except one of abandoned heart can be guilty of such an act without a cause, or upon any slight cause. The terms express and implied malice in truth indicate the same state of mind, but they are established in different ways, the one by circumstances showing premeditation of the homicide, and the other being inferred only from the act committed.

What a man actually does is evidence of his intention, as a rule.

223 It is our common experience that where a man performs an act which will obviously produce a particular result he has intended the result. Therefore when a homicide is committed by weapons indicating design it is not necessary to prove that such design existed at any definite period before the fatal blows. There are, however, more or less other facts and circumstances connected with such conduct which may tend to explain it on the theory of an absence of malice or on a theory of actual lawfulness; for instance, circumstances of self-defense which justify homicide. It sometimes happens in a case of a homicide that there are circumstances of affray in which a man is killed in the course of a quarrel by a blow unconnected with any intention to kill, and so without malice. In such a case the person committing the homicide would be guilty only of manslaughter. There are other circumstances in which a homicide is committed through carelessness or negligence, in which case the inference of malice is explained away and the person committing the homicide is guilty only of manslaughter. But where these and other circumstances which disprove a malicious intent do not exist, then the fact of causing death through the use of a dangerous weapon implies malice and is murder, with the exception that is raised by the defense of insanity or intoxication, where the degree of insanity or intoxication is such that the person committing the homicide is incapable of forming a malicious intent or of harboring a design.

224

*Exception 29.*

That to the giving of said modification of defendant's requested instruction No. 13 aforesaid the defendant then and there duly noted an exception, and the said exception was duly allowed.

That also included among the defendant's requested instructions was the following, being defendant's requested instruction No. 16, to wit:

I instruct you that the defendant is presumed to be innocent, and that you cannot therefore convict him on negative testimony, for nothing short of a universal negative, excluding every possible doubt,

will overcome the presumption in his favor. The positive testimony of one credible witness on any material matter is entitled to more weight than the testimony of several other witnesses equally credible who testify negatively on the same subject.

The said instruction being directed to testimony in the said cause of certain witnesses that they could not say that the defendant was drunk on certain occasions on the day of the offense charged in the indictment and on the day following, and also to testimony in said cause of certain witnesses that they could not say that the defendant was sober on said occasions, and to certain testimony that he was drunk at said times.

That thereupon, when requested as aforesaid, the said court refused to give the defendant's requested instruction No. 16 aforesaid.

225

*Exception 30.*

And that to said ruling and order of the court the defendant then and there duly noted an exception, and the said exception was duly allowed.

That thereafter the judge aforesaid, in the course of his charge to the jury, gave as a modification of, and in place of defendant's requested instruction No. 16 aforesaid, the following, to wit:

Counsel for the defendant has asked for this instruction as to positive and negative testimony in relation to the evidence of the intoxication of defendant:

"I instruct you that the defendant is presumed to be innocent, and that you cannot therefore convict him on negative testimony, for nothing short of a universal negative, excluding every possible doubt, will overcome the presumption in his favor. The positive testimony of one credible witness on any material matter is entitled to more weight than the testimony of several other witnesses equally credible who testify negatively on the same subject."

I cannot give this instruction exactly as asked for, because it is not clear what the counsel for the defendant means by positive and negative testimony. Positive and negative testimony differs in this way: One witness may testify that a certain person said so and so; another witness may testify that he did not hear him say it. Unless he was so near to the person speaking that he must have heard the testimony, his negative testimony cannot be equal to the testimony of the other witness who said that he heard him say it; and even if the second witness was near enough to have heard, if he had been listening, yet his attention may have been occupied for the moment by something else, so that in that case his testimony is not as strong as that of the other. A denial of a proposition is not negative testimony in the sense that defendant's counsel apparently uses the words. A witness is asked if he went to town on a certain day and he answers "no;" this answer is as good as the testimony of another who asserts that he saw him in town on that day, and may be better, and may be classed as positive testimony. Another witness says that he did not see him in town. This is negative testimony and is

worth little, as the man may have been in town without being seen by such witness. A witness who answers "I don't know" to a question is not testifying at all, but is stating his inability to testify. There are degrees of positive testimony. One says a certain person was angry; another says he was somewhat excited and may have been angry; these are both instances of positive testimony but of different values. Another witness says he was not angry. This is positive testimony, though in a negative form, and is equal to the statement of the first witness.

Therefore, in regard to the testimony of the witnesses in this case in relation to the intoxication of the defendant, you will understand that testimony that may differ as to the confidence of the witnesses as to their ability to answer the question may be all positive testimony but different in strength. A witness who saw the man and yet makes no statement of his impressions as to the defendant's condition, but says substantially that he does not know, is confessing his inability to testify; but if he was so near the man, and under circumstances that he ought to have known, such as conversing with him, or watching him, then his answer that he "don't know," or words to that effect, may be considered by you as a circumstance bearing on the probability that he would have known or would have received an impression on the subject if the defendant had been considerably intoxicated. On the other hand, the want of confidence of such a witness in his own knowledge might also be considered as to the question of the defendant's condition of sobriety, because usually a man who  
227 talks with another man who is perfectly sober would be able to testify to that effect. All of this evidence as to the drunken or sober condition of defendant must be weighed by you under this attempted analysis of such questions, keeping in mind the general rule that the evidence of a man who says that he knows a thing is better than that of another man who says he does not know it, having some opportunity to know, or who has a doubt of the matter.

*Exception 31.*

That to the giving of said modification of defendant's requested instruction No. 16 aforesaid the defendant then and there duly noted an exception, and the said exception was duly allowed.

That also included among the defendant's requested instructions was the following, being defendant's requested instruction No. 17, to wit:

You are instructed that while it is true that every man is presumed at all times to be sane and to be mentally competent, yet whenever by the testimony the question of insanity or of mental capacity or competency is raised the fact of sanity or of mental capacity or competency must, like any other fact in a criminal case, be established by the prosecution beyond all reasonable doubt.

The said instruction being directed to testimony in said cause of certain witnesses as to the defendant's intoxication and as to the

defendant's sanity and mental capacity or appearance of intoxication, sanity, or mental competency, at or near the time of the act or acts alleged in the indictment.

228 That thereupon when requested as aforesaid the said court refused to give the defendant's requested instruction No. 17 aforesaid.

*Exception 32.*

And that to said ruling and order of the court the defendant then and there duly noted an exception, and the said exception was duly allowed.

That thereafter the judge aforesaid, in the course of his charge to the jury, gave as a modification of and in place of defendant's requested instruction No. 17 aforesaid the following, to wit:

Where the defense of intoxication is made to a charge of murder the burden is upon the Government to establish not only all the other essential facts constituting the offense, but to establish also the proposition that the defendant at the time of the homicide was of sound mind, and by this term is not meant that he was of perfectly sound mind, but that he had sufficient mind to know that the act he was committing at the time he was performing it was a wrongful act, in violation of human law, and that he could be punished therefor, and that he did not perform the act because being of unsound mind he was controlled by irresponsible and uncontrollable impulse, or was incapable of premeditation.

*Exception 33.*

That to the giving of said modification of defendant's requested instruction No. 17 aforesaid the defendant then and there duly noted an exception, and the said exception was duly allowed.

229 That also included among the defendant's requested instructions was the following, being defendant's requested instruction No. 20, to wit:

In instruct you that if you have any reasonable doubt as to the presence at the time of the act charged of that self-determining, self-controlling power in the defendant which in a sane mind makes it conscious of the real nature of its own purposes and capable of resisting wrong impulses, then you cannot find the defendant  
230 guilty of the crime charged, but can only find him guilty, if at all, of the crime of manslaughter herein defined.

The said instruction being directed to testimony in said cause of certain witness as to the defendant's sanity and mental capacity at or near the time of the act or acts alleged in the indictment.

That thereupon, when requested as aforesaid, the said court refused to give the defendant's requested instruction No. 20 as aforesaid.

*Exception 34.*

And that to said ruling and order of the court the defendant then and there duly noted an exception, and the said exception was duly allowed.

That also included among the defendant's requested instructions aforesaid was the following, being defendant's requested instruction No. 21, to wit:

While voluntary intoxication is no excuse for the commission of a crime, yet if, upon the whole evidence in this case, you shall have a reasonable doubt whether because of intoxication at the time of the killing, if you shall find from the evidence that the accused did kill the deceased and that he was intoxicated at the time, he had sufficient mental capacity to deliberately think upon and rationally determine so to kill the deceased, then you cannot find him guilty of murder although such inability was the result of intoxication.

231 The said instruction being directed to the question raised by the evidence in said cause as to whether the defendant was intoxicated, and if so the degree thereof at the time of the act alleged in the indictment.

That thereupon, when requested as aforesaid, the court refused to give defendant's requested instruction No. 21 aforesaid.

*Exception 35.*

And that to said ruling and order of the court the defendant then and there duly noted an exception and the said exception was duly allowed.

That also included among the defendant's requested instructions aforesaid was the following, being defendant's requested instruction No. 22, to wit:

I instruct you that while intoxication is no excuse for crime, if you believe from the evidence that the defendant was intoxicated at the time the crime was committed, it should be considered for the purpose of ascertaining the condition of the mind of the accused in order to determine whether he was capable of entertaining that specific intent which is an essential ingredient of the particular crime with which he is charged, namely, murder; to determine, whether under all of the circumstances of the case, the defendant is guilty of murder or a less crime to which such essential ingredient is not material.

232 The said instruction being directed to the question raised by the evidence in said cause as to whether the defendant was intoxicated, and if so, to what degree, at the time of any act alleged in the indictment.

That thereupon, when requested as aforesaid, the court refused to give defendant's requested instruction No. 22 aforesaid.

*Exception 36.*

And that to said ruling and order of the court the defendant then and there duly noted an exception and the said exception was duly allowed.

That also included among defendant's requested instructions aforesaid was the following, being defendant's requested instruction No. 23, to wit:

The court instructs you that though the fact of intoxication at the time of the commission of a crime is no excuse, or justification therefor, yet when it is essential, as it is in this case essential, to the crime charged in the indictment, that a particular and specific intent be at the time entertained, the fact of intoxication, if you find there was intoxication, should be weighed and considered in determining the capacity of the defendant to entertain such an intent. And in  
233 this case, if the jury find from the evidence that the defendant did kill the deceased, and that at the time of the commission of the homicide the defendant was by reason of intoxication incapable of entertaining an intent to kill, or if they have any reasonable doubt whether he was at the time in question capable of entertaining such an intent, he cannot be convicted of murder, but, if at all, only of some degree of homicide to which such an intent is not material.

The said instruction being directed to the question raised by the evidence in said cause as to whether the defendant was intoxicated, and if so the degree thereof, at the time of any act alleged in the indictment.

That thereupon, when requested as aforesaid, the court refused to give defendant's requested instruction No. 23 aforesaid.

*Exception 37.*

And that to said ruling and order of the court the defendant then and there duly noted an exception, and the said exception was duly allowed.

That thereafter the judge aforesaid, in the course of his charge to the jury, gave as a modification of, and in place of, defendant's requested instructions No. 20, 21, and No. 22, the following, to wit:

234 The defense of intoxication is made in this case and I charge you that it is no defense, excuse, or palliation unless it is shown to have reached such a stage at the time of the homicide that the defendant was thereby rendered incapable of harboring a malicious intent or of forming a design or of understanding or remembering the lawless nature of the act of taking human life and that it is forbidden and punishable by law. The homicide must be wilful and intentional in order to warrant a conviction of murder.

Where the defense of intoxication is made to a charge of murder, the burden is upon the Government to establish not only all the other essential facts constituting the offense, but to establish also the proposition that the defendant at the time of the homicide was of sound mind, and by this term is not meant that he was of perfectly sound mind, but that he had sufficient mind to know that the act he was



committing at the time he was performing it was a wrongful act, in violation of human law, and that he could be punished therefor, and that he did not perform the act because being of unsound mind he was controlled by irresponsible and uncontrollable impulse, or was incapable of premeditation.

If from all the evidence in the case you believe beyond a reasonable doubt that the defendant committed the crime of which he is accused in manner and form as charged in the indictment, and that at the time of the commission of such crime the defendant knew that it was wrong to commit such crime, and was mentally capable either to do or not to do the act or acts constituting such crime, and of governing his conduct in accordance with such choice, then it is your duty under the law to find him guilty of murder, even though you should believe, from the evidence, that at the time of the commission of the  
235 crime he was not entirely and perfectly sane, or that he was greatly excited or enraged, or under the influence of intoxicating liquor.

I instruct you that in order to convict the defendant of any crime under this indictment you must first find beyond all reasonable doubt that he killed the deceased. If you find the fact of killing by defendant, you still cannot find him guilty of murder unless you also find beyond all reasonable doubt that at the time in question the defendant was capable of entertaining that specific intent which is an essential ingredient of the crime, and for this purpose you should take into consideration the nature and circumstances of the assault, the actions, conduct, and demeanor of the defendant and his declarations both before and after the homicide, and especially to consider whether his mental capacity was sufficient to enable him to entertain the simple intent to kill under the circumstances, or whether his mental faculties were so obscured by intoxication as to have rendered him incapable of entertaining that intent. On the question of intent it is proper for you to consider the previous declarations of the defendant which may tend to show that he entertained a grudge of some kind against McKinnon upon grounds that may have been real or fanciful, and any declarations that may have been made by him subsequent to the homicide expressing a similar feeling.

The question as to his responsibility relates to the time of the homicide. It matters not what may have been his condition before or after, although evidence as to his condition before and after may be considered by you in ascertaining his condition at the time of the homicide.

236 To murder, malice aforethought is essential. Malice is a formed design to kill. It includes premeditation, but the action of the mind is sometimes so swift that premeditation may exist within the shortest time. The act of killing implies malicious intent. Where the mind is so confused by intoxication that it is incapable of forming a design to kill or to understand the nature of such an act and its consequences, the crime of murder cannot exist. Where such is the case, if the person has voluntarily placed



himself in such condition of intoxication that he is incapable of forming a design to kill, and commits the homicide, he then is guilty of manslaughter.

*Exception 38.*

That to the giving of said modification of defendant's requested instructions No. 20, No. 21, and No. 22 the defendant then and there duly noted an exception, and the said exception was duly allowed.

237     mitted upon the high seas, and that evidence of an offense committed in an arm of the sea, or in a haven or harbor, if there is such evidence, is insufficient.

The said instruction being directed to evidence given as above mentioned and set forth in exception numbered "19" and "20" of this bill of exceptions.

That thereupon, when requested as aforesaid, the court refused to give defendant's requested instruction No. 25 aforesaid.

*Exception 39.*

And that to the said ruling and order of the court the defendant then and there duly noted an exception, and the said exception was duly allowed.

That also included among the defendant's requested instructions aforesaid was the following, being defendant's requested instruction No. 26, to wit:

And in this connection I instruct you that the term "high seas" means the open ocean as distinguished from a river, harbor, port, haven, basin, or bay.

That thereupon, when requested, the court refused to give defendant's requested instruction No. 26 aforesaid.

*Exception 40.*

And that to the said ruling and order of the court the defendant then and there noted an exception and the said

238     That also included among defendant's requested instructions aforesaid was the following, being defendant's requested instruction No. 27, to wit:

I instruct you that in order to find the defendant guilty of any crime of homicide it is necessary that the act or acts here charged should have been committed outside of any State, which term State includes not only States admitted to the union of States known as the United States, but it includes also an organized Territory such as the Territory of Hawaii. I therefore instruct you that unless

you find that the act or acts here charged were committed outside of the Territory of Hawaii you cannot find the defendant guilty.

That thereupon, when requested as aforesaid, the court refused to give defendant's requested instruction No. 27 aforesaid.

*Exception 41.*

And that to the said ruling and order of the court the defendant then and there duly noted an exception, and the said exception was duly allowed.

239 That also, among the government's requested instructions, was the following, being the government's requested instruction No. 21, to wit:

I instruct you that if you find from the evidence that the defendant made any statement or statements in relation to the offense charged in the indictment, after such offense is alleged to have been committed, you must consider such statement or statements all together. What the defendant said against himself, if anything, the law presumes to be true, because said against himself. What he said for himself, you are not bound to believe, because said in a statement or statements proved by the United States, but you may believe or disbelieve it as it is shown to be true or false by the evidence in the case. It is for you to consider, under all the circumstances, from the evidence, how much of the whole statement or statements of the defendant proved by the United States is worthy of belief.

That the court gave said instruction as requested as aforesaid.

*Exception 42.*

And that to the said ruling and order and action of the court in giving the government's requested instruction No. 21 as aforesaid, the defendant then and there duly noted an exception, and the said exception was duly allowed.

240 That also the court, in the course of its charge to the jury, gave its own instruction and charge relating to circumstantial evidence as follows, to wit:

In order to convict this defendant upon the evidence of circumstances, and the admissions of the defendant testified to, are in the nature of circumstances, it is necessary not only that all of the circumstances concur to show that he committed the crime charged but also that they are inconsistent with any other rational conclusion. Only when every reasonable hypothesis by which the facts might be explained consistently with innocence have been carefully examined and found wanting, can the conclusion of guilt be legitimately adopted.

You cannot convict this defendant upon evidence merely showing a possible opportunity for the commission of the alleged offense, if there be any such evidence before you, nor can you convict him upon surmises, speculations, and conjectures, nor can you convict him upon

suspicion, no matter how strong. In all criminal cases the proof inculpat-  
 ing the accused should be of a degree of certainty transcending  
 mere possibility, or probability, mere surmises and conjectures, and  
 transcending mere suspicion. The evidence in a criminal case may,  
 let it be assumed, create a strong suspicion, or it may create a strong  
 probability that the defendant's complicity in the alleged crime  
 241 is established as charged, but I instruct you that the law, in its  
 wise and humane demand for the life and liberty of a human  
 being, requires more than a strong suspicion or strong probability; it  
 demands that the evidence should lead to a conclusion of guilt beyond  
 every other hypothesis and to the exclusion of all reasonable doubt.  
 Less than this will not suffice, and you are, therefore, charged that you  
 will not be justified in finding this defendant guilty upon the grounds  
 that it is more probable that he is guilty, if you find any such grounds,  
 than that he is innocent.

*Exception 43.*

That to the giving by the court of said instruction and charge as to  
 circumstantial evidence, the defendant then and there duly noted an  
 exception, and the said exception was duly allowed.

242 That, also, the court, in the course of its charge to the jury,  
 gave its own instruction and charge relating to mental com-  
 petency, sanity and capacity, and intoxication as affecting mental  
 capacity, as follows, to wit:

The defense of intoxication is made in this case, and I charge you  
 that it is no defense, excuse, or palliation unless it is shown to have  
 reached such a state at the time of the homicide that the defendant  
 was thereby rendered incapable of harboring a malicious intent or of  
 forming a design or of understanding or remembering the lawless  
 nature of the act of taking human life and that it is forbidden and  
 punishable by law. The homicide must be wilfull and intentional in  
 order to warrant a conviction of murder.

Where the defense of intoxication is made to a charge of murder  
 the burden is upon the Government to establish not only all the other  
 essential facts constituting the offense, but to establish also the propo-  
 sition that the defendant at the time of the homicide was of sound  
 mind, and by this term is not meant that he was of perfectly sound  
 mind, but that he had sufficient mind to know that the act he was  
 committing at the time he was performing it was a wrongful  
 243 act, in violation of human law, and that he could be punished  
 therefor, and that he did not perform the act because being  
 of unsound mind he was controlled by irresponsible and uncontrol-  
 lable impulse, or was incapable of premeditation.

If from all the evidence in the case you believe beyond a reasonable  
 doubt that the defendant committed the crime of which he is accused  
 in manner and form as charged in the indictment, and that at the  
 time of the commission of such crime the defendant knew that it was  
 wrong to commit such crime, and was mentally capable either to do or

not to do the act or acts constituting such crime, and of governing his conduct in accordance with such choice, then it is your duty under the law to find him guilty of murder, even though you should believe, from the evidence, that at the time of the commission of the crime he was not entirely and perfectly sane, or that he was greatly excited or engaged, or under the influence of intoxicating liquor.

I instruct you that in order to convict the defendant of any crime under this indictment you must first find beyond all reasonable doubt that he killed the deceased. If you find the fact of killing by defendant you still cannot find him guilty of murder unless you also find beyond all reasonable doubt that at the time in question the defendant was capable of entertaining that specific intent which is an essential ingredient of the crime, and for this purpose you should take into consideration the nature and circumstances of the assault, the actions, conduct, and demeanor of the defendant and his declarations both before and after the homicide, and especially to consider whether his mental capacity was sufficient to enable him to entertain the  
244 simple intent to kill under the circumstances, or whether his mental faculties were so obscured by intoxication as to have rendered him incapable of entertaining that intent. On the question of intent it is proper for you to consider the previous declarations of the defendant which may tend to show that he entertained a grudge of some kind against McKinnon upon grounds that may have been real or fanciful, and any declarations that may have been made by him subsequent to the homicide expressing a similar feeling.

The question as to his responsibility relates to the time of the homicide. It matters not what may have been his condition before or after, although evidence as to his condition before and after may be considered by you in ascertaining his condition at the time of the homicide.

Although the trial of one charged with the commission of a crime should always be consistent with the principles of justice, that is, he should be tried fairly with all of the privileges, presumptions in his favor, and opportunities of defense which the long evolution of the practice of courts in common-law countries have gained for accused persons, yet the end sought for in such a trial is not justice as we understand the word in relation to the trial of a civil case, where the object is to cause the litigating parties to render to each other what is rightfully due. The purpose of the criminal laws is to protect society, and the trial of one charged with their violation is an inquest as to his guilt, leading to his punishment if he is found guilty, without considering any compensation to the injured parties. The punishment relates to both the criminal and others, to him by way of removing him for a time or permanently from opportunities of repeating his crime, and as a lesson and a warning to him against a repetition of his guilty conduct whenever he may regain his liberty, and to others of like criminal tendencies as a deterring object lesson and example.

245 This explanation may throw some light on the theory reached by the courts in relation to the defense of insanity, or intoxication, in which a status of responsibility as regards power of deliberation, capability of forming a design, or harboring an intent is necessary to a conviction, which, if present, the fact of insanity or intoxication is not a defense.

The reason of this rule is that the criminal law being enacted for the protection of society against violence and other conduct that is a menace to its security, the question of moral guilt does not figure in the investigation. The punishment of an intoxicated or partially insane person, who, however, at the time of his lawless act, has capacity to commit crime, as elsewhere explained, is justified as to himself, for the reasons given above, and as to others because it is a warning to others, including the intoxicated or partially insane who have a criminal capacity, and having it, have sufficient intelligence and caution to be warned and deterred by the punishment of one of like capacity with themselves. This applies to the person who commits a crime while under the influence of liquor, but who still retains sufficient consciousness to be able to form a design or entertain a criminal intent and to understand the character of the crime committed by him as to its lawlessness and the liability to punishment of one committing it.

There has been some divergence of opinion in the United States as to cases of homicide in which there is an absence of malice on the part of the defendant, because his mental faculties at the time of the homicide are so demoralized by a condition of intoxication into which he was voluntarily entered that he is incapable of forming a specific intent to kill, some holding that under such circumstances the prisoner should be acquitted and others that he should be found guilty of manslaughter. The Supreme Court of the United States has recently adopted the latter view, and I charge you in accordance therewith that if the defendant, at the time of the killing, if you find that

246 he killed McKinnon, was in such a condition of mind, by reason of intoxication, voluntarily acquired, as to be incapable of forming a specific intent to kill, or of understanding the nature of what he was doing, the grade of his crime would be reduced to manslaughter. Manslaughter is the killing of a man unlawfully and wilfully, but without malice aforethought. Malice aforethought, as I have defined it to you, must be excluded from it; that is the doing of a wrongful act without cause or excuse and in the absence of mitigating facts, in such a way as to show a heart void of social duty and a mind fatally bent upon mischief. If that is driven out of the case it must come under the definition of the crime of manslaughter.

The principle of this rule appears to be this, that where a man voluntarily becomes drunk without any malicious purpose, he has without excuse or justification and with a reckless disregard for the rights and the safety of others, entered into a course of excessive and unrestrained indulgence in intoxicants, in itself a criminal offense, which tends to destroy his judgment and confuse and dull his percep-

tions, and at the same time to magnify his grievances, real or fanciful, and to develop delusions, and in short to reduce him to a condition of irresponsibility and frenzy in which the normal restraints to violence are obliterated. In doing this he is held to be responsible for an act of homicide, committed while in such condition, to the extent at least of being guilty of manslaughter therefor, if his mind was incapable of forming a specific intent at the time of the homicide, or of murder if though intoxicated he yet was capable of such intent and of understanding the lawlessness of the act.

The evidence of the defendant's condition of excitement immediately after the homicide does not require you to conclude that he was in such a state of excitement at the time of the homicide, for in his stimulated condition, if you believe that he had been drinking throughout the day, the act of the homicide may well have thrown him off his balance to a degree and have produced that state  
247 of excitement immediately after the homicide which has been testified to by some of the witnesses. In like manner the evidence that the defendant, while present at the coronor's inquest and after beginning to answer questions concerning the homicide, became excited, or, as he was described by one of the witnesses, became unstrung, such unstrung or excited condition you are at liberty under the testimony to attribute to the fact that the day before he had been drinking considerably, or to the other fact of his narration of the terrible tragedy in which he was himself concerned.

To murder, malice aforethought is essential. Malice is a formed design to kill. It includes premeditation, but the action of the mind is sometimes so swift that premeditation may exist within the shortest time. The act of killing implies malicious intent. Where the mind is so confused by intoxication that it is incapable of forming a design to kill or to understand the nature of such an act and its consequences the crime of murder cannot exist. Where such is the case, if the person has voluntarily placed himself in such condition of intoxication that he is incapable of forming a design to kill, and commits the homicide, he then is guilty of manslaughter.

*Exception 44.*

That to the giving by the court of said instruction and charge as to mental competency, sanity, and capacity, and intoxication as affecting mental capacity, the defendant then and there duly noted an exception, and the said exception was duly allowed.

248 That also, in the course of its charge to the jury, the court gave its own instruction and charge relating to confessions, admissions, or statements of the accused made against interest, as follows, to wit:

I instruct you that if you find from the evidence that the defendant made any statement or statements in relation to the offense charged in the indictment, after such offense is alleged to have been committed, you must consider such statement or statements all together. What



the defendant said against himself, if anything, is likely to be true and is entitled to great weight because said against himself. What he said for himself, you are not bound to believe, because said in a statement or statements proved by the United States, but you may believe or disbelieve the whole or any part of it, as it is shown to be true or false by the evidence in the case.

*Exception 45.*

That to the giving by the court of said instruction and charge as to confessions, admissions, or statements of the accused made against interest, the defendant then and there duly noted an exception, and the said exception was duly allowed.

That thereafter, the court having read to the jury its instructions and charge to the jury, the jury did duly deliberate upon their verdict, and thereafter did return a verdict finding defendant  
249 guilty of murder as charged and determining the penalty under their said verdict to be capital punishment.

*Exception 46.*

That to said verdict the defendant by his attorney then and there duly noted an exception on the ground of the said verdict's being contrary to the law and the evidence and the weight of the evidence, and the said exception was duly allowed.

That thereafter, on November 13th, 1908, the said cause came regularly on for further proceedings, Mr. Robert W. Breckons, United States district attorney, being present on behalf of the plaintiff and the defendant being present in person and represented by Mr. C. F. Clemons, his counsel, whereupon Mr. Clemons aforesaid presented to the court the defendant's motion in arrest of judgment and affidavit in support thereof, as follows, to wit:

United States District Court for the Territory of Hawaii.

UNITED STATES OF AMERICA	}
<i>versus</i>	
JOHN WYNNE, DEFENDANT.	

*Motion in arrest of judgment.*

And now, after verdict against John Wynne, defendant aforesaid, and before sentence, comes the said defendant in his own proper person, and moves the court here to arrest judgment herein, on  
250 each and every count in the indictment and not pronounce the same for the reasons following, to wit:

1. Because this court is and was at all times herein without jurisdiction to try the said defendant for any act set forth in the said indictment or for any act set forth in any count thereof;



2. Because the facts stated in said indictment or in any count thereof do not constitute an offense against the laws of the United States of America;

3. Because the statute upon which the indictment herein is predicated, to wit, Revised Statutes of the United States, section 5339, is unconstitutional and void;

4. Because no judgment against the said defendant can be lawfully rendered on the record herein.

And this the said defendant is ready to verify.

Wherefore, and for other errors manifest in the record herein, the said defendant prays that judgment against him be arrested as aforesaid, and that he be discharged and allowed to go hence without day.

Honolulu, November 13th, 1908.

(Sig.) JOHN WYNNE,  
*Defendant above named.*

United States District Court for the Territory of Hawaii.

UNITED STATES OF AMERICA }  
  *versus* }  
JOHN WYNNE, DEFENDANT. }

*Affidavit of Frank E. Thompson, defendant's attorney, in support of motion in arrest of judgment.*

251 UNITED STATES OF AMERICA,  
*District and Territory of Hawaii, ss:*

FRANK E. THOMPSON, being first duly sworn, on oath deposes and says that he is the attorney for John Wynne, the defendant herein above named, and makes this affidavit for the said defendant and on his behalf; that said defendant, John Wynne, was tried in the above-entitled cause before the above-entitled court and a jury on an indictment charging him, the said defendant, with murder, and was by said jury on, to wit, November 9th, 1908, found guilty as charged. Deponent further says: (1) That this court above entitled is and was at all times herein aforesaid without jurisdiction to try the said defendant for any act set forth in the said indictment or for any act set forth in any count thereof; (2) that the facts in said indictment or in any count thereof do not constitute an offense against the laws of the United States of America; (3) that the statute upon which the said indictment is predicated, to wit, Revised Statutes of the United States, section 5339, is unconstitutional and void; (4) that no judgment against the said defendant can be lawfully rendered on the record herein. And the deponent makes this affidavit in support of the said defendant's motion in arrest of judgment hereto annexed; and further the deponent sayeth not.

(Sig.) FRANK E. THOMPSON.

Subscribed and sworn to before me this 13th day of November,  
A. D. 1908.

[SEAL.]

(Sig.) A. E. MURPHY,  
*Clerk of the United States District Court  
for the Territory of Hawaii.*

252 That the court then and there overruled and denied the said motion.

*Exception 47.*

And that to the said ruling and order of the court overruling and denying the motion aforesaid the defendant by his attorney then and there duly noted an exception, and the said exception was duly allowed.

*Exception 48.*

And that to the said ruling and order of the court overruling and denying said motion in arrest of judgment and refusing to grant the said motion on ground number "1" thereof, to wit, that "this court is and was at all times herein without jurisdiction to try the said defendant for any act set forth in the indictment or for any act set forth in any count thereof," the defendant then and there duly noted an exception, and the said exception was duly allowed.

*Exception 49.*

And that to the said ruling and order of the court overruling and denying said motion in arrest of judgment, and refusing to grant the said motion on ground numbered "2" thereof, to wit,  
253 that "the facts stated in said indictment or in any count thereof do not constitute an offense against the laws of the United States of America," the defendant then and there duly noted an exception, and the said exception was duly allowed.

*Exception 50.*

And that to the said ruling and order of the court overruling and denying said motion in arrest of judgment, and refusing to grant the said motion on ground numbered "3" thereof, to wit, that "the statute upon which the indictment herein is predicated, to wit, Revised Statutes of the United States, section 5339, is unconstitutional and void," the defendant then and there duly noted an exception, and the said exception was duly allowed.

*Exception 51.*

And that to the said ruling and order of the court overruling and denying said motion in arrest of judgment and refusing to grant the

said motion on ground numbered "4" thereof, to wit, that "no judgment against the said defendant can be lawfully rendered on  
254 the record herein," the defendant then and there duly noted an exception, and the said exception was duly allowed.

The official stenographer's transcript of testimony in said cause, duly certified by the official stenographer of said District Court, is hereto annexed and made part hereof, and the following papers on file in said cause are hereby referred to and made a part of this bill of exceptions and any copy thereof, duly certified by the clerk of said United States District Court, shall in any proceedings in said cause on appeal or error in any higher or appellate court be read and considered as a part of this bill of exceptions wherever appearing in the record and transcript or in the papers transmitted to said appellate court on any appeal or writ of error taken in said cause, to wit:

The indictment in said cause, No. 366;

Defendant's "Demurrer to indictment" in said cause;

Defendant's "Motion for directed verdict" in said cause;

"Defendant's requested instructions" in said cause;

The "Proposed instructions to the jury on behalf of the Government" in said cause;

The court's "Charge to the jury" in said cause;

The written "Exceptions of defendant relating to instructions" in said cause;

The verdict of the jury in said cause;

"Defendant's motion in arrest of judgment" in said cause.

And also the clerk's minutes in said cause, duly certified by the clerk of said District Court, and the official stenographer's transcript of proceedings, duly certified by the official stenographer  
255 of said District Court, shall in any proceedings in said cause, on appeal or error in any higher or appellate court, be read and considered as a part of this bill of exceptions wherever appearing in the record and transcript or in the papers transmitted to said appellate court on any appeal or writ of error taken in said cause; and also the original "Government's Exhibit 2," mentioned in said bill of exceptions (and copy whereof is hereinabove set forth), shall, where transmitted by the clerk of said District Court to any appellate court on appeal or error, be read and considered as a part of this bill of exceptions.

And now, in furtherance of justice and that right may be done, the defendant presents the foregoing as his bill of exceptions in said case and prays that the same may be settled and allowed and signed and certified by the judge of said court as provided by law.

Honolulu, March 23d, 1909.

JOHN WYNNE, *Defendant.*

THOMPSON & CLEMONS,  
*Attorneys for Defendant.*

56 In the District Court of the United States in and for the District and Territory of Hawaii.

THE UNITED STATES OF AMERICA, PLAINTIFF, }  
 vs. }  
 JOHN WYNNE, DEFENDANT.

*Transcript of testimony.*

Appearances: For the United States: Wm. T. Rawlins, esq., asst. U. S. district attorney, and W. L. Whitney, esq.  
 For defendant: Messrs. Thompson & Clemons.  
 Before Hon. Sanford B. Dole, judge.  
 A. A. Deas, reporter.

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Captain Holmes	212	227	233	
Plaintiff rests, 234.				
For defendant:				
J. J. McDonald	235	238	243	
Defendant rests, 243.				

OCTOBER 22ND, A. D. 1908.

This case came on regularly this day for trial, the plaintiff being represented by W. T. Rawlins, esq., assistant U. S. district attorney, and the defendant being represented by Frank E. Thompson, esq. Before the empaneling of a jury to try this case was proceeded with the court desired to know the wishes of counsel relative to the locking up of the jury after their being sworn until the completion of the trial of this case. On behalf of the United States it was urged by Mr. R. W. Breckons, United States district attorney, that the jury should be so locked up. This motion was opposed by Mr. Thompson, counsel for defendant, who stated that he would, on behalf of his client, waive such action. The court then stated that, acting under its discretion, it would not require that the jury be locked up until after

they had heard the evidence and retired to deliberate upon their verdict if counsel for defendant would file a written waiver in that regard signed by the defendant. This Mr. Thompson agreed to do.

258 Mr. Rawlins here asked that the name of Mr. W. L. Whitney be entered as counsel to assist the prosecution in this case. Mr. Thompson objected to Mr. Whitney's being allowed to so assist, he not be a regularly deputized officer of the United States and not authorized by law to appear for the United States. The court, after hearing argument from counsel on both sides, ruled that Mr. Whitney could not take the place of an official prosecutor and could not sign documents for the Government, but that he might appear as assistant to Mr. Rawlins in the conduct of the case.

Mr. THOMPSON. To which ruling, allowing Mr. Whitney to be associated, I respectfully except.

The drawing of a jury to try this case was now commenced, and at 4 o'clock p. m. the drawing of said jury not being completed, this case was continued and court adjourned until 10 a. m. October 23rd.

OCTOBER 23RD, A. D. 1908.

This case came on regularly this day for continued hearing, and the drawing of a jury to try this case was proceeded with. The following qualified petit jurors were duly impaneled to try the issue herein: John Lucas, Samuel Parker, jr., A. D. Scroggy, James H. Cummings, H. P. Roth, Benjamin H. Clarke, Bertram von Damm, John D. Detor, August H. R. Vierra, Robert W. Sharpe, M. W. Bergau, James D. Kennedy.

Whereupon the jury by consent of counsel not now being sworn were excused, and the further hearing of this case was continued until October 26th, 1908, at 10 o'clock a. m.

OCTOBER 26TH, A. D. 1908.

This case came on regularly this day for continued hearing, and the above-named jury was duly sworn to try this case, whereupon Mr. Rawlins read the indictment to the jury (the court, upon motion of defendant's counsel, ruling that the first two counts of said indictment should not be read), and made his opening statement to the jury, and said trial was proceeded with as follows:

259 JAMES REED, called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. RAWLINS:

Q. What is your full name, please?

A. James Gabriel Bennett Reed.

Q. And what is your business, Mr. Reed?

A. Navigating officer.

Q. Do you hold any license as a seafaring man?

A. Yes; I hold a first officer's license.

Q. And how long have you followed the sea, Mr. Reed?

A. About eleven years.

Q. During the year 1907 where were you employed, Mr. Reed?

A. On the steamship "Rosecrans."

Q. Plying between what ports?

A. Well, we go all over, going to Alaska, to Hawaii, to Portland, wherever we are sent to, where they want the oil.

Q. What business was this steamship "Rosecrans" engaged in?

A. Owned by the Associated Oil Company, and delivers their oil wherever they have got sale for it.

Mr. RAWLINS. Move to strike out the answer as not responsive. I asked what business she was engaged in.

Mr. THOMPSON. Part of it is responsive. (Argues.)

The COURT. I will sustain the motion; the first part may be stricken out.

Mr. THOMPSON. Exception to the ruling of the court.

Mr. RAWLINS. Were you—in the month of September, 1907, were you still employed on the "Rosecrans?"

A. Yes, sir.

Q. And what position did you hold upon that ship?

A. Second officer.

260 Q. I will ask you if you know the defendant, John Wynne?

A. Yes, sir.

Q. Where did you first become acquainted with him?

A. Well, to the best of my knowledge he was about three voyages aboard the ship.

Mr. THOMPSON. Move that that be stricken out as not responsive.

The COURT. The motion is allowed.

Mr. RAWLINS. Q. Do you recall what month you first became acquainted with him?

A. No, sir.

Q. State, if you know, where he was employed during the month of September, 1907.

A. Aboard the steamship "Rosecrans."

Q. And what position did he hold aboard that ship, if you know?

A. Oiler.

Q. Did you know a man by the name of Archibald F. McKinnon?

A. Yes, sir.

Q. How long had you known him?

A. About seven months.

Q. And where was he employed during the month of September?

A. Aboard the steamship "Rosecrans."

Q. What position did he occupy, if you know?

A. Third assistant engineer.

Q. Do you remember what date the "Rosecrans" arrived here in the month of September, 1907?

A. I believe it was regatta day, if I am right.

The COURT. That would be the third Saturday in September, wouldn't it?

Mr. RAWLINS. Q. During the time that the "Rosecrans" was here, in the month of September, 1907, was there any trouble aboard that boat?

A. In regard to what do you mean—fighting on the boat?  
261 Mr. RAWLINS. Withdraw the question. Q. You say you were in the "Rosecrans" for a long period of time; how long.  
Mr. Reed?

A. I was in her sixteen months altogether.

Q. And she was a steamboat, was she?

A. Yes, sir.

Q. And where was the room occupied by McKinnon aboard that ship?

Mr. THOMPSON. Object to that, as there is no evidence that McKinnon occupied any room on board the ship, and further that the question is leading.

Mr. RAWLINS. Withdraw the question. Q. Where did Wynne and McKinnon reside during the voyages of the steamship "Rosecrans?"

A. Well, McKinnon was on the fourth door up on the port alleyway.

The COURT. Q. Where?

A. On the port alleyway, fourth door up. The chief engineer he had two doors to his room, then the second assistant's room, then the third assistant's room.

Q. And what quarters did this defendant occupy?

A. Well, there is a break in the house, and then he occupied the next room to that—a break in the house where they kept the coal and potatoes—and the next room was the oilers' room, and there were six oilers—

The COURT. Q. The oilers' room first, and then Wynne's room beyond it?

A. No, sir; Mr. Wynne slept in the same room as the oilers.

The COURT. Q. Wynne was an oiler, too?

A. Yes, sir; he was oiler.

The COURT. Q. You mean another man slept in that room?

A. There were either four or six; I am not sure.

Mr. RAWLINS. Q. Was the alleyway you have referred to between decks or on the main deck?

A. Main deck, sir.

Q. And in speaking of the port side you speak of it as the  
262 alleyway on the port side; now, on what side of the ship was that?

A. By standing looking forward, the port side is on your left hand.

Q. Now, you went into this alleyway—first, how many rooms were there in this alleyway?

A. I will call them out. The first room was the mate's room, and the second was the toilet; the next was the water-tender's room, where two slept in—no, then was the quartermasters' room, two men slept in there; then water-tender's room; then the oilers' room; then there was this kind of scullery like, where they kept coal and potatoes; then



bake shop, butcher shop, and then the third assistant's room, second assistant's room, and chief engineer's room.

Q. Well, in reference to the bow of the vessel, was the chief engineer's room near the bow or towards the stern?

A. The last room on the end—the stern.

Q. So that as you go into the alleyway, going towards the stern, what would the first room be that you met?

A. I came out of the starboard alleyway—

Q. Well, if you came down from forward to aft into this alleyway, what was the first room you come to?

A. That port alleyway is blind on the port side, only a porthole, no door; you would have to come from the starboard side, over the hatch. The first door you come to would be the toilet.

Q. Do I understand you that at the end of the alleyway you have to go in from the stern end first?

A. Yes, sir; unless you want to go in from the starboard side.

Q. As you approach, coming from aft, and go into the alleyway, what was the first room you come to?

A. The chief engineer's room.

Q. And the next one?

A. Second assistant.

Q. The next one?

263 A. Third assistant.

Q. And then the next room to that, if any?

A. Butcher shop.

Q. Next one to that?

A. Baker shop.

Q. The next?

A. The break in the house, and then the next is the oilers' room.

Q. Now, will you explain to us, for the benefit of the court and jury, what you mean by "break in the house?"

A. Well, that used to be a flush-deck ship, but she has been built over again with a house, which would make her a saloon-deck; she was all open before, and when Captain Matson bought her, went to work and built her up—or when she went into the transport business, and then when they built it up, it left a kind of a space, and that is where they keep potatoes and coal and so on, and then there would be another house.

Q. After the break in the house, what was beyond that?

A. Another house, and then it was the oilers' room, the first room.

Q. This alleyway that led past the chief engineer's room and that of the second and third assistant, did that continue on into the house where the oilers were quartered?

A. No, sir; that was the only three rooms in that house, with the exception of the butcher shop and baker shop.

Q. But the alley—was it possible for a man to go through the alley that led past the room of the chief engineer and third assistant and continue on and go into the house where the quarters of the oilers were?

A. Oh, yes; just one alleyway.

Q. Was there more than one entrance into the alleyway where the oilers were quartered?

A. Yes, sir.

264 Q. Will you kindly explain that?

A. Well, the fore part of this port alleyway was blind, there is only a porthole; if you want to come in the front way you could cross over a small hatch there, from the upper side, and then walk just a little place forward into the carpenter room, in the port alleyway on the starboard side; and this was the mate's room; as you came across this hatch you would almost come to the door of the toilet.

Q. And what other entrance was there?

A. You could come across from the galley, the sailors' messroom, go through the fiddley; that's about the only three ways you could go in.

Q. Was there any passage or alleyway from the quarters occupied—from these two houses you have testified to, to the engine room?

A. Any passage?

Q. Passage, or manner of exit or alleyway or whatever you call it?

A. You mean between these two houses?

Q. Withdraw the question. Could a man go from this house, the one occupied by the chief engineer and the third assistant, and from this one occupied by the oilers, to the engine room?

A. No, sir; that is just only a small place.

Q. How close to the room occupied by McKinnon and the room occupied by Wynne was the engine room?

A. McKinnon's door was very close to the engine-room door, in my judgment—it is impossible to be accurate—fifteen feet, something like that; and then you would have to walk up the alleyway possibly fifty feet and you come to the oilers' room.

265 Q. Where were you on the night of September 20, 1907?

A. That was the night of the murder, was it?

Mr. THOMPSON. Move that be stricken out.

The COURT. That was a question asked by the witness.

Mr. RAWLINS. Q. Do you recall where you were on the night of September 20th, 1907?

A. September 9th?

Q. September 20, 1907?

A. Yes, sir.

Q. Where were you?

A. I was in Honolulu.

Q. Did you see—what did you do on the day of the 20th—on the night of the 20th?

A. I was on watch from six to twelve.

Q. On board the "Rosecrans"?

A. Yes, sir.

Q. Where was the "Rosecrans" at that time?

A. Lying down at the oil wharf.

Q. In what port?

A. Honolulu.

Q. And what time did you go on watch, did you say?

A. Six o'clock in the evening.

Q. Who else was aboard the vessel at the time, if you know?

A. The two quartermasters were with me, and I believe the captain was aboard; the chief engineer was aboard, Stahl the ice man was aboard, and the water tender on watch, I don't know his name, he was down below on watch; that is about all I can remember.

Q. Did you see McKinnon that night?

A. Yes, sir.

Q. Did you see Wynne?

A. Yes, sir.

266 Q. Where did you see McKinnon that night?

A. He came over and spoke to the ice man, who was sitting on the rail on the starboard side, and he came over and told Stahl—

Mr. THOMPSON. Object to what he told him.

Mr. RAWLINS. Q. You say you saw him talking to the ice man; what next did you see him do?

A. He told him he was going—

Mr. THOMPSON. Object to what he told, as hearsay.

Mr. RAWLINS. Q. After you saw him talk to the ice man, Mr. Reed, where next did you see McKinnon?

A. Lying on a settee in his room.

Q. What time was it when you saw McKinnon talking to the ice man?

A. Around eight o'clock, I should say.

Q. Before or after eight?

A. Well, I couldn't say. I never looked at the time.

Q. Now, you say he left the ice man and came over towards you, is that correct?

A. No, sir.

Q. After he left the ice man where did he go?

A. Into his room.

Q. Did you see him go there?

A. Into the alleyway.

Q. After you saw him go into the alleyway where next did you see him?

A. On the settee in his room.

Q. At the time you saw him lying on a settee—how long after you saw him go into that alleyway did you see him lying on that settee?

A. About one hour and a half.

Q. How did you happen to see him in there, Mr. Reed?

A. I was sitting on the door sill of my room when the mate he hollered to me that—

267 Mr. THOMPSON. Object to what he said.

The COURT. Q. You were sitting on the door sill of your room; what did you do?

A. The mate hollered to me.

Q. What did you do?

A. I ran aft.

Mr. RAWLINS. Q. When you got aft what happened?

A. I ran aft, and as I came out from the door I seen the defendant, Mr. Wynne, and he waved his hands, to place them on me——

Mr. THOMPSON. Object to anything Mr. Wynne said, as there has been no proof of the corpus delicti as yet; I anticipate the answer of the witness. (Argues.)

(Mr. Rawlins argues.)

Mr. Thompson asked permission to cite authorities in support of his contention, which request was granted by the court, and thereupon the jury was excused until 2.30 p. m. and a recess was taken until 1.45 p. m.

AFTERNOON SESSION.

Mr. Thompson here argued and cited authorities in support of his contention. Mr. Rawlins argued against the proposition, and Mr. Whitney started to supplement Mr. Rawlins' argument.

Mr. THOMPSON. In order that I may get it on the record, I now object to Mr. Whitney arguing this matter or taking any part in the trial of this case, on the ground that he is not an authorized official of the United States, that he is not a United States district attorney or in any way connected with that department, is not commissioned by the United States, and therefore is without authority to appear for the Government in this case or to take any part in the trial.

The COURT. Objection overruled.

Mr. THOMPSON. Exception to the ruling of the court.

At the close of Mr. Whitney's argument Mr. Thompson  
268 argued, and at the conclusion thereof the court sustained Mr.

Thompson's objection. Whereupon the jury was called in and the trial of this case proceeded as follows:

JAMES REED (direct examination, cont'd).

By Mr. RAWLINS:

Q. You have testified here, Mr. Reed, that when your attention was directed to that part of the ship where the third assistant engineer's room was that you started to go and met this defendant; now, without telling us what he said to you, or what you said to him, tell us what was the next thing you did.

A. Well, I ran down the starboard alleyway into the port alleyway, went in and seen a crowd standing outside the door, and I went in there and worked on the body for about ten minutes, I should judge, and the captain of the "Marion Chilcoat" came in and I went out on deck and told the captain——

Mr. THOMPSON. Object to what he told the captain.

Mr. RAWLINS. Q. Now, when you came down that alleyway where did you go to; what place?

A. I went up the alleyway into the third assistant's room.

Q. And will you describe that room?

A. Yes, sir; as you go in through the door there is a washstand and then a kind of desk, with drawers in it, on the after part of the room, and a fore and aft bunk, a single bunk, and in the forward part of the room there is a settee.

Q. What way was this settee running?

A. Athwart ships, right across the ship.

Q. And the bunk runs fore and aft?

A. Fore and aft, with the ship.

Q. When you got in there what did you see?

A. I seen the man McKinnon lying on the settee with a big gash in his head.

Q. In what position was he lying?

269 A. On his back.

Q. And what was the first thing you did?

A. I ordered the quartermaster to get me some ice water, pulled the reservoir out of the washstand, and ordered him to get ice water, and to get another can and keep me supplied.

Q. Was anybody in the room when you got there besides McKinnon?

A. Not that I remember; no, sir.

Q. Can you recollect how McKinnon was dressed at that time?

A. No; I couldn't recall that.

Q. Well, go ahead with what you did in that room there, in reference to McKinnon.

A. Then I applied ice water to him and tried to revive him to get a statement, and then I saw it was no use; after the captain of the "Marion Chilcoat" came in I went on deck and told the captain—

Q. Never mind that.

A. I went on deck and then I came back into the room again and I asked the mate—

Mr. THOMPSON. Object to that.

The WITNESS (continuing). Then I ordered the body taken—

Mr. RAWLINS. I submit this is all part of the circumstances here.

Mr. THOMPSON. Submit it is inadmissible. (Argues.)

The COURT. I doubt whether it is evidence in this case.

Mr. RAWLINS. Q. After you got back into the room tell what you did, Mr. Reed.

A. I spoke to the mate—will that go?

The COURT. Q. Then what did you do next?

A. Then he wouldn't give me the men, and I ordered him carried out on deck to give him some fresh air, thinking that would revive him.

Mr. RAWLINS. Q. Carried who on deck?

A. Got the captain of the "Chilcoat" to help me carry him on deck so he could get fresh air, thinking that would revive him, but he never. Then the patrol wagon came down, and they refused

270 to take him, and we plead with them, and at last they took him in the patrol wagon, and I went up with the body.

Q. How did they get McKinnon off the ship into the wagon?

A. Carried him off on a stretcher.

Q. Were you with him then?

A. Yes, sir.

Q. Where was the patrol wagon at the time?

A. Up at the end of the dock.

Q. And then, after that, did you get into the wagon?

A. Yes, sir.

Q. What next happened?

A. We took him to the hospital and left him on to the operating table, and the doctor placed a tube to his ear and the other end to the man's breast, to McKinnon's breast, and I asked him——

Mr. THOMPSON. Object to what he asked him.

The COURT. Sustain the objection.

Mr. RAWLINS. Q. How long were you there at the hospital?

A. Not very long; at the most I should judge about ten minutes.

Q. From what you saw at that time can you state whether or not McKinnon was living or dead?

A. He was dead.

Q. Now, going back to the ship, Mr. Reed, at the time you started towards—when you were first called towards the third assistant's room, will you take up your story from there and tell us what next happened. You were called, you say, and you started towards the third engineer's room; what was the first thing happened after you were called?

A. What was the first thing I done?

Q. Go ahead; you have testified here that you heard a call; the mate called you, and you immediately—you went towards the third assistant's room. What was the first thing that came to your attention on the way there?

271 A. The first thing that came to my attention was the defendant.

Q. And where was he at that time?

A. Right about the middle of the deck, between the two companion-ways.

Q. And was there anybody else there?

A. Yes, the quartermaster was there, if I remember right; I wouldn't be sure; I may be wrong; my running out there so sudden and wanting to know what the trouble was, I didn't pay much attention to anything but the man who spoke to me.

Q. Who spoke to you?

A. The defendant.

Q. What did he say to you there that night?

Mr. THOMPSON. Objected to on the ground that the corpus delicti has not been established.

(At the request of Mr. Rawlins the court excused the jury while counsel argued on Mr. Thompson's objection. At the conclusion of

the argument the court ruled that Mr. Rawlins would have to put in more evidence before he could proceed along this line, and the jury was thereupon called into court and the trial of this case proceeded as follows:

JAMES REED (direct examination cont'd).

By Mr. RAWLINS:

Q. Withdraw the previous question. When you stepped into McKinnon's room, the third assistant engineer's room, what position was he lying in; can you describe it—as near as you can?

A. Lying almost on his back.

Q. In reference to the door of the room where was his head?

A. Towards the door.

Q. How near to the door?

A. I should say about two feet.

Q. Now, in reference to the settee that he was lying on, where was this washstand and desk you have testified to?

272 A. Right across from the settee in the corner, just on the left-hand side of the door as you went in, in the corner.

The COURT. Q. Opposite?

A. Yes, sir; just opposite the settee.

Mr. RAWLINS. Q. Now, what was McKinnon's condition when you looked at him? What did you see?

A. He was lying on his back, and I put my hand on his breast and I heard his heart fluttering, and I sent for the water.

Q. Well, was there any other—did you notice any difference in the man, anything different than when you saw him early in the evening?

A. He had a gash in his head.

Q. Where was the gash?

A. Right on his temple, near his temple, as near as I remember it.

Q. Was there only one gash? Describe his head, as near as you can.

A. Well, when I seen him he was lying on his back, and there was a big gash in the side of his head: looked as if——

Mr. THOMPSON. Object to how it looked.

The WITNESS (continuing). It seemed as if you struck a piece of wood into a piece of beef and pulled it out; it looked that way.

Q. How large a wound was it?

A. Well, it was a bruise, just a bruise like, with all this shattered flesh around it.

Q. How large a wound was it?

A. You couldn't tell how large it was, because it was bleeding.

Q. Were there any other wounds on him?

A. Never seen any.

Q. What was the condition of his person and the room in reference to blood?

A. Well, there was blood all over the walls, and there was blood on the settee, where it rolled down off his face.



273 Q. What was the condition of the floor?

A. Well, I wasn't in his room before, so I don't know.

Q. No; the floor.

A. Oh, the floor. Well, the floor, after you walked on it, was all wet and everything.

Q. Now, what wall was the blood on?

A. It seemed to me it was all over the room the next day.

Q. When you went in the room that night, in reference to the settee, where was the blood on the wall?

A. I didn't pay no attention to the blood around, but I seen it the next day.

Q. Was it anywhere near the settee, where McKinnon was found by you?

A. He was lying on his back, and the blood running from this wound would run on the settee.

Q. Now, you say there was blood on the wall. What wall—the one opposite the settee or nearest the door or opposite the settee?

A. Blood on the after part of the room and on the ceiling, but I couldn't swear there was any on the fore part of the room, because I didn't notice it; but I remember seeing the blood on the top of the room and on the after side of the room.

Q. While you worked over McKinnon there did he talk to you?

A. Never opened his mouth; no, sir.

Q. Did he show any signs of recognizing you?

A. Not a thing; no, sir.

Q. Did you notice anything about how—were his eyes open or closed?

A. As near as I can remember, they were closed.

Q. On the way to the hospital did he speak to you?

A. No, sir.

Q. Did he recognize you?

A. No, sir.

274 Q. After they got him there on the operating table did he speak to or recognize you?

A. No, sir.

Q. Now, while you were in the hospital, Reed, did you look at McKinnon's head again?

A. Well, I kind of glanced all over his whole body.

Q. Well, did you see any other marks on him besides that one you have testified to?

A. No, sir.

Q. Was his body stripped?

A. No, sir; only where we opened up his shirt.

Q. Now, this wound that you have testified to, Mr. Reed, was it an open wound, or was it a wound that was closed or did it have anything protruding from it?

A. No, it just looked like it was a great big piece all bleeding, which was fagged like.

The COURT. Q. The flesh broken?

A. Yes, sir; the flesh was broken.

Mr. RAWLINS. Q. Did you touch that part of his head?

A. Yes, sir.

Q. Now, what did you feel when you touched it?

A. Well, I couldn't swear anything to that, because I didn't feel close enough. I was only feeling around to see if I could get any life in him.

Q. Did you wash the wound off?

A. Yes, sir.

Q. After you washed it what did it look like?

A. It was all fagged in; we were working his hands and feet, and while we were doing that the blood was still gushing out.

Q. Can you give us some idea of the size of this wound; was it the size of a ten-cent piece or larger, the spot where the blood came through?

275 A. It looked like a stick  $1\frac{1}{4}$  inches thick and sharp at the point, and if you was to stick that into a piece of meat and then pull it out it would leave a wound like that.

Q. Do I understand it was an open wound?

A. Yes, sir; the skin was broken, bruised, and it was bleeding.

Q. Bleeding?

A. Yes, sir.

Q. What else did you see in the room when you went in there?

A. That is all I took notice of, of the man on the settee.

The COURT. Q. What was his position on the settee, you say he was laying on his back. What kind of position was he in, a natural position or a position which showed anything unusual?

A. As near as I would judge from my own opinion it was that he was lying on his side and then rolled over.

Q. On his back?

A. On to his back, just as if he rolled over from his side to his back; this is only—if I remember right.

Mr. RAWLINS. Q. Now, when you started from the position that you were standing on deck, when you were called by the mate and ran to the third assistant's room and met this defendant, what took place there?

Mr. THOMPSON. I understand this is the question objected to before, and before proceeding I should like the privilege of cross-examining the witness on the testimony in regard to the wounds.

The COURT. You may.

Mr. THOMPSON. Q. You say, Reed, that when you went there you were pretty excited, weren't you?

A. Well, I wasn't excited, but I wanted to get everything done on the moment, as quick as possible.

Q. You didn't notice where the blood was until the next day?

A. Not on the walls, because I didn't look around.

Q. Didn't look at anything except at the body?

A. At the man.

276 Q. And didn't see any blood except what oozed from his head to the floor?

A. No, sir.

Q. And then you carried the body off?

A. Yes, sir.

Q. You didn't see the room until the next day?

A. Not until the next day.

Q. And when you left the room you left it open?

A. Yes, sir.

Q. And who did you leave the ship in charge of, when you left the ship?

A. The captain.

Q. That is Captain Holmes?

A. Captain Holmes.

Q. Things were in pretty general consternation when you left, weren't they?

A. Well, everybody was talking more or less.

Mr. RAWLINS. Object to this, because I understood the purpose of this cross-examination was as to the wounds, as counsel stated.

Mr. THOMPSON. It is for the court to decide whether or not the circumstances are such as to warrant an admission—whether the circumstances are such as to establish, in your honor's mind, the corpus delicti. (Argues.)

The COURT. That includes any signs of blood.

Mr. RAWLINS. The court allows him to proceed along these lines?

The COURT. Yes.

Mr. THOMPSON. Q. And when you went to the hospital the examination that you made there of the wound was superficial, wasn't it; you didn't pay any great attention to the wound at the hospital?

A. No, sir.

Q. There were doctors there?

A. Yes, sir.

277 Q. And you just stood around; isn't that about it?

A. The doctor and nurse was on one side of the table and I was on the other.

Q. And you just stood there and watched them do their duty?

A. Yes, sir.

Q. The wound, you say, looked as if a sharp stick—

A. That was the way that the bruise looked.

Q. The bruise is the wound, is it not?

A. Yes, sir.

Q. The bruise looked as if a sharp stick had been jabbed in and drawn out, you said pulled out?

A. Well; yes, sir.

Q. And when you put your hand down to his heart his heart was still beating?

A. Yes, kind of fluttering.

Q. The statement you made that it looked as if he had been on his side and then rolled over is simply your own fancy in regard to it?

A. Yes, sir.

Q. And there was nothing there to give you that idea except that was the way it looked to you?

A. No, sir; that was my own belief.

Q. Predicated on nothing but just your idea?

A. Yes, sir.

Q. The room was not disturbed any?

A. No, sir.

Q. How long had he been there when you went down; how much time had elapsed between the time you saw him go to his room and that time?

A. I should judge half an hour, approximately.

Q. Then it was about 9.30. I take it?

A. I should think so.

Q. He came aboard at 8 o'clock?

278 A. Yes, sir.

Q. Did you converse with him when he came aboard?

A. He spoke to the ice man.

Q. And when you went down to the room you sent for ice water, and from that time on you were busy?

A. Yes, sir.

Q. And what you have testified in regard to how the room looked, as to blood, is as you saw it the next day?

A. Yes, sir.

Q. Not as you saw it at that time, but as you saw it the next day?

(No answer.)

Q. Do you catch my meaning?

A. No, sir; I do not.

Q. The room as you saw it the next day is the way you have described it here?

A. Yes, sir.

Mr. THOMPSON. That's all.

Mr. RAWLINS (to reporter). Read my last question.

(Question read.)

A. When I left my room door?

Q. When you left the place, when you were on the deck, when you were called by the mate you said you were sitting on your door sill, of your room. Tell us what occurred.

A. I was sitting on the door sill and the mate hollered across the hatch to me—his room was forward on the port alleyway, and he hollered to me, said "Reed, come aft——"

Mr. THOMPSON. Never mind that.

Mr. RAWLINS. In consequence of that, what did you do?

A. I ran aft through the starboard alleyway, and was half way across the deck when I met the defendant; then I rushed in——

Q. When you met the defendant did anything occur?

A. Yes, sir.

279 Q. What was it?

A. He went to put his hands up, as if to touch me, and he says—  
Mr. THOMPSON. Object to what the defendant says, on the ground that the corpus delicti has not been established. (Argues.)

The COURT. The evidence in regard to the sharp stick was that this was a very thick stick, I think it was 1½" in diameter, a very thick stick, and the evidence is sufficient, I think, for the introduction of whatever admission he may have made at that time. I overrule the objection.

Mr. THOMPSON. Exception.

(Here court adjourned until October 27th, at 10 o'clock.)

OCTOBER 27, 1908—MORNING SESSION.

This case came on regularly this day for continued hearing, before the court and the above-named jury, and the trial thereof was proceeded with as follows:

JAMES REED (direct examination continued).

By Mr. RAWLINS:

Q. Just at the close of yesterday, Mr. Reed, you testified that the defendant—as to your meeting the defendant and he put his hands up, will you start in there and tell us what happened?

A. He put his hands up, he said to me "Jimmie Reed, I killed the son of a bitch and I am glad of it," in kind of an excitable way.

Q. Well, what next happened?

A. I pushed him aside and said "Shut up;" I rushed in, I didn't see any trouble on deck and I heard talking in the alleyway, and I rushed in the alleyway and into the third assistant's room.

Q. Did you see Wynne again that night?

A. Yes, sir.

280 Q. Where?

A. Out on deck.

Q. How long after you had seen him, how long after was this that you had seen him coming in, when on your way to the third assistant's room, that you saw him on deck; how long after you met him on your way to the third assistant's room did you see him on deck?

A. Well, I see him when I came after the captain.

Q. Did you have any further talk or conversation with Wynne on that night?

A. No, sir.

Q. When you started for the patrol wagon where was Wynne?

A. As near as I can remember he was at the pin rail.

Q. The pin rail?

A. Yes, sir; by the main rigging, where we take the ropes down and put them on pins to hold it fast.

Q. What flag does the steamer "Rosecrans" fly?

Mr. THOMPSON. Objected to, as, if it is to prove registration, it is not the best evidence of registration: she might fly any flag. (Argues.)

Mr. RAWLINS. (Argues.) We don't content that the vessel flying the flag alone would go to show the registry of the vessel, but it is merely a circumstance to that effect.

Mr. THOMPSON. If that is a circumstance I am willing to let it go in, as a circumstance, but if it is to prove the registration I object to it. If produced to show her registration it is incompetent; if for any corroboration there is nothing to corroborate at present, therefore it is not evidence at this time. It is incompetent as not being the best evidence, which is the registry; it is immaterial for any other purpose.

The COURT. Overrule the objection.

Mr. THOMPSON. Exception.

A. The American flag.

281 Mr. RAWLINS. Q. At the time that this offense was committed state whether or not the "Rosecrans" was afloat.

A. Yes, sir; she was afloat.

Q. In what waters?

A. Honolulu Harbor.

Q. And all that you have testified to, Mr. Reed, happened here in Honolulu Harbor, and on the island of Oahu, within the Territory of Hawaii?

A. Yes, sir.

Q. And within the district of Hawaii?

A. Yes, sir.

Cross-examination by Mr. THOMPSON:

Q. Mr. Reed, some of us are not quite as well up on nautical construction as you are, and in order that we may all get a little better idea of the location of Mr. Wynne's room and the general location of the vessel, I am going to ask you, if you can, to be a little more explicit; that would suffice if you were addressing a lot of sailormen; but talk as you would to a lot of landmen, if you can.

A. Well, you just want the companionway—

Q. Well, I am going to ask you some questions, but don't be too nautical about it, Mr. Reed; Mr. Rawlins tells me you have drawn a plan of the ship; have you?

A. It is not finished, though.

Q. Well, that is all right, you can explain the rest of it. (Mr. Rawlins hands plan to Mr. Thompson.) Where was she lying on September 20th, the "Rosecrans?"

A. Lying down at the oil wharf, the railroad dock.

Q. She was connected to the oil tanks, was she not, by hose?

A. Yes, sir.

Q. By the railroad dock you mean the Oahu Railway & 282 Land Company's dock, do you?

A. Yes, sir; I think that is the name.

Q. How was she headed; was she bow in or stern in?

A. Bow in.

Q. And on which side of the railroad dock was she, do you know? Was she on the side nearest the town, nearest the mountain, or the side nearest Waikiki?

A. The side nearest Hackfeld's dock.

Q. That is, she was across the slip from Hackfeld's dock, was she?

A. Yes, sir.

Q. She was then in that slip formed by Hackfeld's dock and the oil—the Oahu Railway & Land Co.'s dock?

A. Yes, sir.

Q. Was she away down the slip, so she was completely in it, or was her stern extending out beyond it?

A. She was lying as far up as she could get, and then we had to lay off the dock about six feet.

Q. In order to get—

A. The doctor wouldn't allow us to come any nearer than six feet from the dock.

Q. You were within six feet of the dock in the slip and away up to the end of the slip?

A. Yes, sir.

Q. Then your port side was nearest to the dock?

A. Yes, sir.

Q. This is the plan you drew? (Showing.)

A. Yes, sir.

Q. Now, the jury is much more interested in this than anyone else, except the court. Show the jury which side was into the dock, and then we will mark that.

A. The port side.

Q. This side?

283 A. This. (Witness points to the companion way, place marked "Port side alleyway.")

Q. To be literally correct, the ship was lying this way? (Showing.)

A. Yes, sir.

Q. Well, now, we will mark this "A," indicating the bow of the ship.

A. This will be the bow of the ship. (Pointing.)

Q. "B" is the bow?

A. Yes, sir. "S" will be the stern; here's the chief engineer's room; "A" is the bow, "B" is the stern.

Q. "C" is the port side?

A. Yes.

Q. "D" is the starboard side?

A. This is only representing one alleyway.

Q. This would be the starboard side of that alleyway, wouldn't it? (Showing.)

A. Yes, sir.

Mr. LUCAS (a juror). Q. Why don't you mark it in full, "starboard" and "port," then there can't be any mistake about it?



Mr. THOMPSON. I shall adopt the suggestion, it being an excellent one. (Marks plan as suggested, and also "bow" and "stern.") Q. The portion of this diagram marked "port side alleyway" is the alleyway in which the rooms regarding which you testified are situated, is it not?

A. Yes, sir.

Q. The room nearest the bow, which we will mark "1," is the oilers' room; is that right?

A. That just shows the one room; in the other house there are rooms forward of the oilers' room.

Q. This is the one we are interested in.

A. The oilers' room.

Q. Where Mr. Wynne roomed?

A. Yes.

284 Q. Next to that we have the open space, where coal and potatoes are kept?

A. Yes.

Q. How big is that room?

A. Well, that is just—formerly there were but two houses, and there has been a deck put over; it is two houses and it would leave, I should judge, about 12 feet space between these two houses.

Q. Well, we will show that as #2, then?

A. This is no room; this is an open space.

Q. An open space of 12 feet; now is this an alley here? (Pointing.)

A. No, sir; just shows the place.

Q. What is this, an alleyway?

A. No, sir; just a little above where you go to the bake shop door.

Q. #3 is the baker shop?

A. Yes, sir.

Q. How big is the baker shop?

A. Just a small place, 6 x 8, or something like that.

Q. Six feet on the alleyway and eight feet deep, or vice versa?

A. Well, about 8 feet deep, I should say.

Q. And six feet on the alleyway; how much space, how large a space is it—in this bulkhead and the line here?

A. I should judge two or three feet.

Q. How big is the bulkhead?

A. You mean thickness of the iron?

Q. No, I presume it is on two sides?

A. It is a house; it is about 12 feet high from deck to deck.

Q. How much on the alleyway?

A. You mean across the alley; how wide was the alley?

Q. No; how much on the alleyway is this, how thick is the bulkhead; how many feet through?

A. I don't understand what you mean.

285 Q. Well, is it a single bulkhead or double bulkhead?

A. Single.

Q. Then this is simply the thickness of the iron?

A. Thickness of the iron.

Q. Then what is the distance from the end of the room which we have marked "2," to the door of the baker shop?

A. I should say about two or three feet.

Q. And then the baker shop is about eight feet?

A. Yes, sir.

Q. Now, the butcher shop, how big is that?

A. Just about the same; it is the ice box, too, where they keep the meat.

Q. Call the butcher shop "#4;" now the third engineer's room, how big is that?

A. About six feet by eight, something like that.

Q. We will call that "#5;" what is this space in there? (Pointing.)

A. This space here would be the third assistant's room; that represents the door.

Q. This marked "third engineer's room" should be only the door, and this whole business would be the room?

A. Yes.

Q. All right; how big is this, about eight feet, you say?

A. Yes.

Q. Engineer's room, about 8 feet on the alleyway; now, #6, I take it this is the door and this is the room?

A. Yes, sir.

Q. About the same size, eight feet on the alleyway?

A. Yes, sir.

Q. And #7, chief engineer's room?

A. He has two doors in his room.

Q. Two doors or two rooms?

286 A. Well, the bulkhead was formerly two rooms, and they took them out and made a big state room.

Q. #7 is the chief engineer's room, which has two doors?

A. Two doors.

Q. And how long is it on the alley?

A. About sixteen feet, I guess; sixteen or eighteen feet I should judge.

By a JUROR. Q. Is that from memory or from measurements?

A. From memory.

Q. Then it is not absolutely correct?

A. No, sir; just approximately correct.

By Mr. THOMPSON. Q. Then from the oilers' room to the end of the chief engineer's room, is about how many feet on the alley?

A. Well, I guess about 45 or 50 feet from the oilers' room to there, you mean?

Q. Yes.

A. Oh, I guess it would measure over fifty feet.

Q. Now on the starboard side of the port alleyway is a room marked "Engine room;" where is the alley that you come through

from the starboard side to the port alleyway, regarding which you testified?

A. This is way forward.

Q. Way forward of here?

A. There is a hatch, don't you see, forming a portion—it is built over, and this hatch was used for a freight hatch, and after it got built over they put that for a blind hatch, you can't get in. This port alleyway is blind forward, there is only a porthole in it; there is a bulkhead right across the port alleyway. Then on the starboard side there is a door, and by going in there, this door, past the room that I have, the second mate; the third mate is on the other side. Then there was the sailors' mess room, and as you pass that you turn around to the right and cross that hatch and come in the alleyway.

287 Q. What was the usual way of going into the port alleyway; was that the only way of getting in from the starboard side?

A. You can go through the galley.

Q. That is here? (Pointing.)

A. Yes, sir.

Q. # 8, you would pass then from the starboard side—

A. This here (showing) is all the engine room, too.

Q. There must be a starboard alleyway over here?

A. This only represents the port alleyway.

Q. How would you go from this part in order to get into the galley?

A. You could go from the starboard alleyway, go in forward, or go in from the after end.

Mr. RAWLINS. Q. Is this on a level with that (pointing), or supposed to be over it?

A. This is down below; we are representing the rooms on the port alleyway.

Mr. THOMPSON. Q. First platform, middle platform, these are down below?

A. Down below.

Q. Is this on the main deck?

A. On the main deck; yes, sir.

Q. And when you go aboard the ship the first thing you strike is this alleyway?

A. Yes, sir; the port alleyway.

Q. But you strike it aft?

A. Yes; because we had the gangway out aft.

Q. Where was the gangway?

A. Right at the break of the house, at the chief engineer's room.

Q. # 9, gangway—

By a JUROR (to Mr. Thompson). Put "blind" at the end of that alleyway.

288 Mr. THOMPSON. Q. Then, when you come aboard this would be about your course, up here?

A. Yes, sir; go right aboard here; this is supposed to be flat, this alleyway, and the gangway would be lying here, on the deck, you go right in here. [Showing.]

By a JUROR. Q. This is about amidships, is it?

A. Yes, sir; right amidships.

By Mr. THOMPSON. Q. Now, right over here are there any lights?

A. A gangway light.

Q. What kind of light is a gangway light?

A. An electric light.

Q. Isn't it a cluster light?

A. Sometimes they have and sometimes one light.

Q. Now, on September 20th can you say what kind of light it was?

A. No; I couldn't say.

Mr. THOMPSON (to Mr. Rawlins). Have you any objection to this going in? [Referring to plan.]

Mr. RAWLINS. I would like to ask one question. Q. This blue line here, extending under the letter "C," is that the side of the vessel?

A. That represents the saloon deck; these here are all the doors, standing up just like that [showing], just the way it would be; the ship is like this.

Mr. RAWLINS. Q. This is not a ground plan?

By a JUROR (Mr. Lucas). Q. This is simply the elevation, not the ground plan of the deck?

A. See, it would be like that [showing]. This would be the deck here, and this would be the rooms, and below these rooms there is another deck. This here is the break of that house, the last of that house, and then the deck is out here again. The main deck extends out here.

[Pointing towards stern.]

289 By Mr. RAWLINS. Q. Well, what I want to know is this; the rooms represented by 1, 2, 3, 4, 5, 6, 7, and 8, it is not a ground plan, but an elevation?

A. Yes.

By Mr. RAWLINS. Q. And this here, up on top, would be the saloon deck?

A. Yes.

By Mr. RAWLINS. Q. And you say the point "9" here, is where the gangway would come?

A. Yes; just any part there; they put the gangway up.

Mr. RAWLINS. No objection to its going in evidence.

(Plan received in evidence and marked "Defendant's Exhibit A.")

By Mr. THOMPSON. Q. How long, about, is she, Mr. Reed?

A. I couldn't tell, I don't know the exact length.

Q. Give us your best recollection.

A. I should say 360 feet, somewhere around that.

Q. How much beam?

A. Approximately, I guess, 24 feet, something like that.

Q. 24 feet beam?

A. Yes, sir; that is only approximate. I don't know the exact measurements.

Q. You say that on the night of September 20th—that was regatta day, was it not?

A. Yes, sir.

Q. And was the date you got in?

A. Yes, sir.

Q. You don't remember whether the cluster light was there or not?

A. No, sir; I am not certain.

Q. What time did you go aboard ship that night?

A. I should judge, I don't know the exact time, but I was there before six, between five and six.

Q. You went on watch then?

290 A. On watch at 6 o'clock.

Q. You had been on watch about an hour and a half or two hours when McKinnon came aboard?

A. About two hours.

Q. You referred in your direct examination, Mr. Reed, to some trouble on the ship during the day. What was that?

A. Trouble aboard the ship?

Q. Yes; when Mr. Rawlins asked you "Do you remember of any trouble on the ship on the 20th of September," you said "Some fighting in the day."

A. I don't know.

Q. Was there any trouble there during the day?

A. I don't remember; there may have been some loud talking or something of that sort, and then passed it off.

Q. If there had been any, would you have remembered it?

A. Not in the afternoon, because I was there.

Q. You didn't go on watch until six?

A. Not until six o'clock.

Q. When did you get in in the morning?

A. That is something I couldn't say exactly.

Q. Well, about what time?

A. I guess we got there a little after eight.

Q. And by the time you got docked it was nearly ten, was it?

A. No; we got docked a little after eight, as near as I can judge.

Q. Then, did everyone go ashore, pretty well?

A. Some went ashore; yes, sir.

The COURT. A little after eight o'clock in the forenoon?

A. Yes, sir.

By Mr. THOMPSON: Q. Did you go ashore?

A. Not then, because it was my watch on deck.

Q. You went ashore at noon, did you?

A. Yes, sir; a little after.

291 Q. And during the time that you were on watch, from 8 to 12, was there any trouble there then?

A. I never heard of any; there may have been some loud talking, but I didn't pay no attention to it.

Q. Well, when McKinnon came on board about 8 o'clock, did you speak to him?

A. No, sir.

Q. All you know about him is he spoke to the ice man?

A. Yes, sir.

Q. You had no conversation with him at all?

A. No, sir.

Q. Did you see Wynne come abroad?

A. No, sir.

Q. You didn't see Wynne until you say you saw him at the door—

A. On the after part of the main deck.

Q. You saw nothing of him until that time?

A. Not a thing; no, sir.

Q. How long have you known Wynne?

A. I should say three trips before this.

Q. Known him intimately or just as you met him in your duties?

A. Just as I met him.

Q. He was in a different department from you?

A. Yes, sir; he was in the engine room and I was on deck.

Q. You saw nothing of him during the time he was performing his duties; during the time he was performing his duties you saw nothing of him?

A. I saw him occasionally on the deck walking around the ship.

Q. Your duties and his were separate and apart, were they not?

A. Yes, sir.

Q. He was in the engineer department and you in the navigating department?

A. Yes, sir.

292 Q. And, being only an oiler, you were not brought in contact with him?

A. No, sir.

Q. Didn't eat at the same table?

A. No, sir.

Q. And your acquaintance with him is rather superficial, isn't it?

A. Yes, sir.

Q. During the time he was aboard ship did you ever observe him closely?

A. Well, he was a very quiet man, never had much to say, very quiet and paid attention to his own business, and he would speak to me occasionally and I would speak to him, in the same way.

Q. Was it his custom to address you as "Jimmie?"

A. Sometimes; yes, sir.

Q. On the evening when you saw him, when he threw his arms around you—

Mr. RAWLINS. Object to it, as there is no such testimony.

Mr. THOMPSON. Q. When he put his arms up in front of you, to be literally correct, Mr. Reed, in this matter, and said "Jimmie Reed, I have killed the son of a bitch and I am glad of it," how did he look?

A. He looked very excited to me; of course I didn't pay no attention then, I wanted to get to the scene of the trouble.

Q. You didn't pay particular attention?

A. It was kind of dark out there.

Q. And just brushed him away, and said "Shut up," and rushed in?

A. Just that.

Q. And that was about the extent of your knowledge of him on that evening, isn't that right, Mr. Reed?

A. Yes, sir.

Q. Did he holler loud?

A. Well, kind of that crying, excitable way.

293 Q. You say it was dark and you didn't get a good look at him, and he looked excited?

A. I didn't know the circumstances of the trouble, and I paid no attention.

Q. When you say he looked excited to you, how did he look when he looked excited?

A. Well, by his voice, in a kind of a shaking voice, that is why I supposed he was excited; not seeing his face I couldn't say.

Q. You couldn't see his face?

A. I couldn't see.

The COURT. Q. How did you know it was Wynne?

A. Well, by his conversation; he was excited and the way he spoke to me, he was excited and the kind of half crying way he spoke.

Q. You recognized his voice?

A. Oh, yes, sir.

By Mr. THOMPSON. Q. And afterwards, Mr. Reed, when you say you saw him, he was standing over at the side of the pin rail, was he?

A. Yes, sir.

Q. Did you pay any particular attention to him then?

A. No, sir.

Q. You were very much interested in disposing of the body?

A. Yes, sir.

Q. Getting it into the patrol wagon?

A. Yes, sir.

Q. And what became of him after that you don't know?

A. Not a thing more.

Q. You made no attempt to apprehend him at that time?

A. Not a thing; never at any time.

Q. You simply took Mr. McKinnon and went away with him?

A. Yes, sir.

Mr. THOMPSON. That's all, Mr. Reed.

Mr. RAWLINS. Nothing further.

294 Dr. McDONALD, called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. RAWLINS:

Q. What is your full name?



A. Jonathan T. McDonald.

Q. And what profession are you following?

A. I am a physician and surgeon, and am also employed by the board of health.

Q. In what capacity?

A. Among my duties are those relating to autopsies; I have to make the autopsies on bodies brought to the government morgue.

Q. How long have you been a practicing physician?

Mr. THOMPSON. We will admit the qualifications of Dr. McDonald.

Mr. RAWLINS. Q. You are duly licensed to practice in the Territory of Hawaii?

A. I am.

Q. I will ask you if you ever had occasion to perform an autopsy or post-mortem on the body of one A. F. McKinnon?

A. Post-mortem, I did.

Q. When was that, Doctor?

A. It was on the 21st of September, 1907.

Q. And what time of day was it when that autopsy was performed?

A. Well, it was in the morning, along in the forenoon.

Q. And at what place was it performed?

A. At the government morgue, adjoining the board of health.

Q. Were you there when the body arrived?

A. I couldn't state positively, but my impression is that the body was on the table when I entered the morgue.

Q. What condition was the body in at the time you saw it there?

A. Well, it was—the body was clothed in the regular working suit of a mechanic, I judged, or perhaps a machinist or engineer, 295 short jacket and overalls, and they were soiled with machine grease; looked like the regular clothes worn by a machinist. The upper portion of this clothing was saturated with blood pretty well dried; blood on the face and hands. There was a black sock on the right foot; the left foot was bare. There were no shoes, as I recollect this case.

Q. Was it the body of a male or female?

A. The body of a young man. The clothing was removed. We found the body of a healthy appearing young man, cleanly shaved; he had a brown moustache, brown hair. No evidences of any previous illness.

Q. On the body proper, on the limbs, were there any marks or disfigurements?

A. No; there were no wounds or abrasions found.

Q. On the head what did you find, if anything?

A. Well, on the head I found a very severe injury, the results of a terrible violence.

Q. Now, will you explain in detail, and slowly, because this is hard to get down for the stenographer, and for the jury, we want them to grasp it, will you explain in detail these wounds you found on the head?

A. Well, if I could be allowed a subject to demonstrate on.

Mr. RAWLINS. How about myself?

Mr. THOMPSON. I have no objection.

A. [The witness steps down from the stand and illustrates his answer by pointing to places on Mr. Rawlins' head.] Most of the wounds were on the right side of the head; about three inches above the ear there was a transverse cut some two or three inches long, which did not seem to have been made by a knife or cutting instrument, it was not a clean cut wound, and in feeling of this cut or wound you could easily discern that the bones of the skull were fractured. As a source of the bleeding, the profuse bleeding, the saturation of the

296 clothing, it all flowed from without a triangular shaped incision just in front of the ear, a cut two or three inches long, beginning at about that point [indicating], extending in this direction, and another in this direction. Now, these did not seem to be clean-cut wounds of a knife, rather torn and mangled, as though done with some blunt instrument. On palpating or feeling of the parts here I found that this entire area, indicated by my pencil, like that, had been mashed to fragments; the bones there were evidently in small pieces; that is, I could feel the grating of the bones; it was all mashed and broken and contused. The eye here was practically destroyed; it involved the entire organ, the portion which surrounds the eye, that was broken into a large number of small pieces; they would grate upon each other upon handling. Just below the eye was a peculiarly shaped wound, in that it was rather crescent shaped, about in this position, a little over an inch from one extremity to the other, the concavity upward; it was about that shape [showing]. Now, that was more of a clean-cut wound; that is, the margin was quite regular; it seemed to have been inflicted with an instrument that cut the skin right on the bone beneath, so as to make a comparatively clean-cut wound. The eye was practically destroyed; seemed to be mashed and distorted, torn up. I also found some abrasions on the side of the neck, this portion [showing] where the skin had been slightly abraided, but no great amount of damage done. I looked over the body carefully; those were the principal wounds.

Q. This wound that you found on this area of the face, was that a gaping or a closed wound?

A. A portion of it, as indicated by the cuts, would be called a gaping or open wound. Parts of the area were covered by unbroken skin, parts of the damaged area.

Q. Did you open the body at all?

A. I did.

A. What did you find there?

297 A. I found nothing pathological; that is, nothing diseased, nothing to indicate that the young man was anything else but healthy; in a good, healthy condition. I would say that it was the viscera of a healthy young man.

Q. What would you say was the cause of his death, Doctor?

A. Well, it was those wounds; the injury to the head—I consider it necessarily a mortal wound.

Q. Did you open the head at all?

A. I believe the head was not opened. I had a sufficient cause of death there, from what I saw.

Q. In your experience you would class these, would you, as mortal wounds?

A. I would.

Q. From the appearance of the wounds, were they such as could be self-inflicted?

A. In my opinion; no.

Q. From the character of the wounds, from observation and feeling, and from the examination you made, what kind of an instrument would you say would be capable of inflicting an injury of that nature?

A. Well, some heavy, blunt instrument.

Q. What would you say as to the force necessary to be employed?

A. Well, I would say that it would require considerable force; quite heavy blows.

Q. From what you saw there would you say it was the result of one, or more than one blow?

A. I should think it would be the result of more than one blow.

Q. The bony—the bones immediately under these wounds, what condition were they in, Doctor?

A. Well, they were broken in every direction; small pieces.

The COURT. Q. Under both wounds?

A. Well, it was practically one wound, that is, the whole area; let's see, it was on the right side of the head——

The COURT. Q. You spoke of one wound above the ear?

298 A. Well, those were cuts, but the whole area, by feeling of it, you could see that the bones underneath were broken in small fragments, and they grated against each other; some were so detached you could almost pick them out.

The COURT. Q. That wasn't the case above where they were cut?

A. Not as high up as that, Judge. The open wound started about the level of the ear, down towards the mouth, and another cut directly downwards. Those were down to the bone, and it was possible to pick out pieces of bone there; it had been fractured in such small pieces.

By Mr. RAWLINS. Q. Were there any wounds on the left side of the head?

A. I believe not, to the best of my recollection. The ones I have mentioned are all that I can recall.

Q. From your observation of the wounds that you saw on this man's head, I will ask you, Doctor, and on your statement that it was some heavy, blunt instrument, I will ask you if the wounds could be inflicted with an instrument of that nature? [Showing hammer.]

A. Yes; I believe it could have been, the wound under the eye being very suggestive of a blow from a hammer; the crescent-shaped wound under the eye, as though made by the edge of a hammer.

Q. Now you have said that this wound under the eye was comparatively clean cut?

A. It was not so ragged as the others. It was a comparatively clean-cut wound; it was regular, crescent-shaped.

Q. Can you explain the reason of that?

A. Well, it could be very readily explained, by the edge of the hammer.

Q. Well, would the edge of the hammer alone be sufficient to explain that, or would the fact that something was under the hammer?

A. Well, there was a resistant bone beneath the skin and near the surface, which, in my opinion, would account for the crescent-shaped wound there.

299 Mr. RAWLINS. We offer the hammer at this time, and ask that it be marked for identification.

(Hammer marked "#1 for identification.")

Mr. RAWLINS. Q. The wounds on the neck, Doctor, were they lacerated or incised wounds?

A. Well, I would call them contused wounds.

Q. Skin broken at all?

A. Very slightly; more of a scraping or scratching.

Q. Any discoloration?

A. Very slight.

Cross-examination by Mr. THOMPSON:

Q. Was the bone of the eye broken, Doctor?

A. Under the eye?

Q. Yes.

A. I don't know that I have any notes on that; I wouldn't want to swear positively that this underneath was broken. I believe I have no note on that.

Q. You have no independent recollection on the subject?

A. No.

Q. Is the bone under the eye a more solid one than the skull?

A. No; I wouldn't say that it was.

Q. Less, is it not, owing to the peculiarity of its shape?

A. Well, it is not very thick.

Q. Not very thick, and it is not in the form of an arch, is it?

A. Yes, it is rather concave; the lower quarter of the orbit of the eye.

Q. Is it any sharper than the skull?

A. The edge is somewhat sharp.

Q. Then would it be more or less liable to break, under the same force, as the skull?

A. It would be more liable, of course.

300 Q. The wound on the neck—did you say "wound" or "wounds" on the neck?

A. Well, yes, we will call it a wound, I suppose.

Q. Now, in your judgment, was the wound, was it a wound or wounds on the neck?

A. Well, it might be called a wound. It is like a contusion on the side of the neck.

Q. You said it might be caused from the blow of a hammer; the wound on the neck, in your judgment, was that the result of one or two blows?

A. No; I don't recollect that I said the wound on the neck was caused by a blow of a hammer; I said there was a contusion there.

Q. In your judgment, what was the wound on the neck caused by?

A. Well, I haven't any idea; I don't know.

Q. It may have been from almost anything?

A. From a scuffle.

Q. It may have been there before the other wounds were inflicted?

A. Quite possibly.

Q. The wounds on the skull; how many were there, in your judgment?

A. Well, it is hard to state how many blows or how many—whether it would be called one wound or many; that was the condition.

Q. Not whether it was one wound or many, because "wound" might be used collectively; but what you saw, would you say it was the result of one blow or more than one blow?

A. In my opinion more than one blow.

Q. Then, in your opinion, the blow on the neck, the contusion on the neck, was from one source, whatever it might be?

A. Yes; it was separate from the other.

Q. The wound on the eye, that was a separate and distinct cause, was it?

A. That was rather separated from the rest of the injury to the skull.

Q. And the balance of the injury to the skull may have  
301 been one, but, you think, more than one blow?

A. I should think more than one blow, yes.

Q. You say you didn't examine the head, didn't open the head?

A. Didn't open the head.

Q. Didn't expose the brain?

A. Didn't expose the brain.

Q. The ordinary cause of death from skull fracture is what?

A. Well, shock.

Q. To what?

A. Shock to the brain, the nervous system, the loss of blood.

Q. That would result in instant death, would it not?

A. Well, not necessarily instant death.

Q. Ordinarily?

A. Well, no; not necessarily.

Q. Now, in your judgment, was the death here caused by loss of blood?

A. That may have contributed to it, but I could not say there was enough blood lost to cause the man's death.

Q. You would not say that?

A. No; although there was considerable hemorrhage, as shown by his clothing.

Q. External hemorrhage; you didn't examine for internal?

A. No.

Q. You know nothing about the brain then, other than what was exhibited by superficial examination of the skull?

A. I know there was injury enough there to cause the man's death.

Q. Do you reason from cause to effect, or from effect to cause?

A. Well, I took the results of the injury and examined them sufficiently to account for the man's death.

Q. Then you start off this way: First premise, the man is dead; second premise, he has a wound or contusion on his head; conclusion, he died from the wound or contusion on his head. Is that about  
302 the way you arrived at your conclusion?

A. Well, I approached it to find the cause of that man's death. Of course I saw the man was dead, but it was my business; that is, what I was there for, to find out the cause of the death, which I did.

Q. And you satisfied yourself by saying that inasmuch as he is dead, and he has this bruise on his head, that bruise caused his death; isn't that about the system of your logic?

A. Well, of course I knew he was dead, but what I was sent there for was to find what caused this death, and I found this injury to his head, which would easily account for his death; and I found no other cause.

Q. Then you accounted for his death by the injury on his head?

A. Yes.

Q. You didn't start off by saying the injury on his head caused his death, because if you had you would have examined the brain?

A. It was not necessary to examine the brain, because I found sufficient cause of death without examining the brain.

Q. Now, Doctor, would it not have been possible to have inflicted injuries of that kind on the skull without causing death?

A. No. I consider it a mortal wound; I don't believe that a man could survive as severe an injury as that was.

Q. Does a fractured skull always result in death?

A. Well, that kind of a fracture, so thoroughly, and so much damage done as there was there would cause death, and always causes death. I would consider it a hopeless case.

Q. And how would it cause death, would it cause instant death?

A. Not necessarily.

Q. All right; how long might a man live under those circumstances?

A. Well, it is hard to tell; a number of hours, possibly.

Q. He might live a number of hours?

A. He might live a few hours, possibly, or he might die very soon.

303 Q. If he died from the shock, as contradistinguished from the loss of blood, would it take two hours?

A. Well, it might. Sometimes they die quite suddenly, and sometimes it is longer.

Q. Well, now, if the shock caused it, would the brain show any effect of it?

A. No; the brain would not show any anatomical lesion from shock.

Q. Would it be possible, by examining the brain, to see whether or not any portion of the skull had entered the brain?

A. I found that the brain was damaged.

Q. How?

A. Well, by palpation, by feeling of this wound, it was so thoroughly broken, comminuted and fractured; some of those pieces of bone were on edge.

Q. And they must have gone into the brain?

A. Certainly the brain was damaged.

Q. Well, if they went into the brain, how long would it then take before the person would die?

A. Well, it is hard to tell; might linger a few hours, might die suddenly.

Q. Well, what were the probabilities of the case?

A. Well, in this particular case, with the brain being injured in that locality, I wouldn't expect the man to live but a very few hours; he might die right immediately. With that amount of injury to the brain near the vital center, near the medulla, I would expect him to die instantly.

Q. What is the medulla?

A. One of the vital centers of the brain, situated at the base of the brain; the prolongation of the spinal cord.

Q. In your judgment, was death contributed to by all of the blows or by a single one; would that have been sufficient?

A. In my opinion it was a succession of blows, and death resulted from all of the blows.

Q. A succession of fierce blows, because it would take blows of considerable force to do the damage that was done?

A. Yes.

Q. Even with such an instrument as has been exhibited to you?

A. Yes.

Q. The first time you saw the body was at the morgue?

A. At the morgue.

Q. You testified at the coroner's inquest, did you not?

A. I did.

Q. At that time did you testify in regard to which side the injuries were on?

A. Oh, yes; the right side.

Q. Did you have any notes at that time?

A. Yes; I had notes.

Q. Have you those notes with you?

A. I have.

Q. Might I look at them?

A. You may. (Hands notes to Mr. Thompson.)



Q. I see by this report, Doctor, that the body was opened, an inspection, an examination was made. When you say the body was opened, that was everything but the head?

A. Yes; the trunk.

Q. The trunk was opened to examine the organs, and the heart and the stomach, but leaving the head alone?

A. Well, I examined—most of my examination was of the head, the injuries to the head.

Q. Well, now, I mean not the external, but the internal portion of the head.

A. Yes.

305 Redirect examination by Mr. RAWLINS:

Q. I understand you to say that a person by these injuries might die instantly, or might die within a few hours?

A. It is hard to tell, yes.

Q. There is nothing unusual for a man with such a wound as you found on this man's head to live for a short time?

A. For several hours; I wouldn't expect him to recover; he might live for several hours.

Mr. RAWLINS. That's all.

Mr. THOMPSON. No further questions.

The COURT. Q. Have you any idea how many blows were inflicted with the heavy instrument, possibly a hammer?

A. Well, I have no means of knowing.

Q. And have you any means of knowing whether the death was caused by any one of those blows, or by all of them combined?

A. Well, I would say that all of them combined—the combined result of the injury—it seems to me there must have been more than one blow, and death was caused by all, taken collectively.

Q. You spoke of a clean cut, didn't you, high up, a sharp cut?

A. I think I spoke of the crescent-shaped cut under the eye, as being comparatively clean cut. They were cuts or wounds, I should say; they were not inflicted with a knife or any cutting instrument, rather inclined to be ragged or torn.

Q. All this injury on the head was connected together?

A. All one area.

By a JUROR (Mr. Lucas). Q. Doctor, one blow of that hammer would knock a man insensible, would it?

A. I believe it would, a hammer of that weight and delivered with sufficient force, I should think would knock a man insensible delivered on most any part of the head, a hammer of that weight.

Q. It would make him unconscious immediately?

A. It would make him unconscious immediately, in my opinion.

306 G. M. BRIGHT, called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. RAWLINS:

Q. What is your full name, please?

A. Glenn Milton Bright.

Q. And what occupation do you follow, Mr. Bright?

A. Marine engineer.

Q. And how long have you been such?

A. Eight years.

Q. And what certificate do you hold?

A. First assistant's.

Q. How long have you held that certificate, Mr. Bright?

A. About one year and a half.

Q. I will ask you if you know the steamship "Rosecrans?"

A. Yes, sir.

Q. Have you ever been employed aboard that vessel?

A. Yes, sir.

Q. In what position?

A. First assistant engineer.

Q. When did you first go aboard of her?

A. I don't remember.

Q. When did you leave her, do you remember?

A. No.

Q. Were you a member of the engineering department on that vessel during the month of September, 1907?

A. I couldn't say.

Q. Do you know—were you on board of that vessel a year ago?

A. I couldn't say that either.

Q. I will ask you if you know this defendant, John Wynne?

A. Yes, sir.

Q. Where did you become acquainted with him?

307 A. Aboard the "Rosecrans."

Q. Aboard the steamer "Rosecrans?"

A. Yes, sir.

Q. Do you remember the occasion of his leaving the "Rosecrans?"

A. Yes, sir.

Q. Were you a member of the engineer's department aboard the "Rosecrans" at that time?

A. Yes, sir.

Q. How long before the time he left the vessel had you become acquainted with him?

A. About nine days, I think; nine or ten days.

Q. Was that your first trip on the ship?

A. Yes, sir.

Q. What position was he holding aboard that vessel?

A. Oiler.

Q. And in whose watch?

A. The second assistant's.

Q. Who was the second assistant engineer at that time?

A. I can't recall the name now.

Q. Do you know a man by the name of McKinnon, Archibald F. McKinnon?

A. Yes, sir.

Q. State whether or not he was a member of the engineer's department of the "Rosecrans."

A. Yes, sir; he was third assistant.

Q. Do you remember the occasion when you last saw Wynne abroad the ship?

A. Yes, sir.

Q. When was that; do you remember?

A. That was the night of the murder.

Q. Now start in at the morning of that day. What time did the vessel arrive here; you recollect?

A. Well, I should think between 8 and 9 in the morning.

308 Q. And what dock did she go to, if you know?

A. Went to the oil dock down here.

Q. Did you see McKinnon that morning?

A. Yes, sir.

Q. Did you see the defendant, Wynne?

A. Yes, sir.

Q. Did you see them both aboard the vessel?

A. Yes, sir.

Q. Did you have occasion that morning to converse with Wynne?

A. Yes, sir.

Q. In reference to what?

A. Why, I jumped on him because he went away without my permission in the morning.

Q. Well, what time was this when you had the conversation with him, if you can recollect?

A. Well, I think about 11 o'clock; something like that.

Q. And what was said and done at that time?

A. I asked him what he went ashore for without letting me know where he was going, because I wanted all hands to turn to and get finished, because we have got to have a little time off; and he said he thought he was on watch and wouldn't have to go on until the afternoon, and he made some remark about McKinnon—that McKinnon had made him clean more brass than some Italian that was up there—and I told him I didn't want to hear anything about it; that he was on the second assistant's watch and McKinnon had nothing to do with him; and that is all that was said then.

Q. Now, did you see him again on that day?

A. Yes, sir.

Q. Whereabouts?

A. I think in Scotty's cafe.

Q. What time was it when you went into Scotty's cafe?

309 A. I couldn't say.

Q. Did you see McKinnon later on that day?

A. Yes, sir; in the afternoon.

Q. Where did you see him?

A. Him and I came off the ship together.

Q. And where did you leave him?

A. At Scotty's.

Q. About what time was that?

A. I should judge about two or three o'clock.

Q. And did you see him again after that?

A. No, sir.

Q. Now, who was with Wynne at the time you saw him in Scotty's cafe?

A. I remember one party that was there, McDonald; that's about the only one I remember.

Q. Did you have any conversation with Wynne at that time?

A. Yes, sir.

Q. Who started the conversation?

A. I wouldn't be sure, but I think Wynne did.

Q. Do you recollect what was said?

A. Well, I remember something was said about the third assistant engineer—about this brass—that he made him clean more brass than he did the dago, or something—that was the remark he made.

Q. I will ask you whether you and Wynne were in the same company; were all together on that occasion?

A. No, sir.

Q. Were you sitting at the same table?

A. I couldn't say, I don't remember; but I think he was at another table, if I remember correctly.

Q. Was there anything else said in this conversation between you and Wynne?

A. Not to my recollection.

Q. Well, what was the result of this conversation; did you  
310 have more than one conversation with him in Scotty's that night?

A. Not that I remember.

Mr. THOMPSON. In the afternoon—two or three o'clock was the last time he was in there?

Mr. RAWLINS. Q. What time was it when you saw Wynne in Scotty's cafe?

A. Some time in the evening; I don't know what time.

Q. That was after you had been there in the afternoon with McKinnon?

A. Yes, sir.

Q. Now, will you tell us everything that transpired in Scotty's between yourself and Wynne, so far as you can recollect?

A. I think he came up and mentioned this again, and I told him I didn't want to listen to any orations; that McKinnon had nothing to do with him; that he was on the second assistant's watch, and I said, "I have charge of the work in the daytime, and I don't want to listen to it; if the job don't suit you, you can quit;" that's all I remember.

Q. Did the conversation stop there, or did Wynne keep on?

A. I couldn't say now; I know we had a few words, but I don't recollect what it was.

Q. What was his condition as to sobriety at that time?

A. Well, I think he had had a couple of drinks.

Q. Well, was he drunk or sober?

A. I couldn't say; I don't think he was drunk.

Q. Now, after you got through with this conversation with Wynne, did he remain there?

A. I don't think so. I didn't see him any more.

Q. Did you see him go out?

A. No, sir.

Q. Did you remain there?

A. A little while.

Q. And when you left there, was Wynne there?

311 A. Not to my knowledge.

Q. After you left that place, Mr. Bright, where did you go?

A. I went down aboard the boat.

Q. And do you recollect what time it was when you left Scotty's?

A. No, sir.

Q. Who did you see when you got aboard the boat?

A. Well, just as I was getting out of the hack the chief engineer came running out; he was in his underclothes, as I remember, and he was going up to get a doctor; he said he thought the third assistant was murdered, and I went aboard the boat, and they brought Mr. McKinnon out onto the deck, and I and the second officer worked on him till the patrol wagon, I think it was, came down. We felt his pulse, tapped his heart, and were patting him on the soles of his feet and one thing or another.

Q. Was McKinnon on deck when you arrived?

A. Yes, sir.

Q. And how long were they working over him?

A. I don't know how long before I got there, but the second officer and I worked till the patrol wagon came; I don't know how long it was.

Q. Who else was there at that time that you can recollect?

A. I remember seeing the captain and the mate and the captain of the sailing vessel that we towed down.

Q. Do you remember his name or the ship?

A. I don't know now whether it is the "Monterey" or the "Rod-  
erick Dhu;" I think it was the "Monterey," though.

Q. You can not recall the captain's name at this time?

A. No, sir.

Q. Did you see Wynne when you came aboard the ship?

A. Yes, sir.

Q. Where was he?

A. He was standing on the deck, up against the rail.

312 In reference to where they were working over McKinnon, how far away was he from that spot?

A. Oh, I should judge fifteen or twenty feet.

Q. Was he by himself?

A. No; I think the mate and captain were standing by him; somebody was; I didn't pay much attention.

Q. Now, when you saw McKinnon aboard the ship, did you observe his condition?

A. You mean when I got back in the evening?

Q. Yes.

A. No; it was dark; you couldn't see much.

Q. Well, could you see at all?

A. Yes.

Q. What did you see, Mr. Bright?

A. Well, I see the man was unconscious.

Q. Did you take hold of his person in any way?

A. Yes, sir.

Q. What part of his body?

A. I was throwing water and patting him on the heart, working his arms up and down.

Q. Did you touch his head at all?

A. Yes, sir.

Q. What did you find there?

A. Found blood.

Q. Anything else?

A. No.

Q. What flag did the "Rosecrans" fly at that time?

A. American flag.

Q. And at the time this affair took place state whether she was afloat or not.

A. Afloat, to the best of my ability; I don't know how deep the water is there.

313 Q. She wasn't in a dry dock, was she?

A. No, sir.

(Here a recess was taken until 2 p. m.)

#### AFTERNOON SESSION.

G. M. BRIGHT (direct examination cont'd).

By Mr. RAWLINS:

Q. I have one more question to ask before the cross-examination. Mr. Bright, do you know where McKinnon's room was located aboard the "Rosecrans?"

A. Yes, sir.

Q. What side of the ship was it on?

A. The port side.

Q. And how near to his room did you live?

A. I was on the starboard side.

Q. How near to McKinnon's room was the entrance to the engine room?

A. Well, right opposite the door of the engine room was the chief engineer's room; then second assistant's room, and McKinnon's was next.

Q. Now was that the only entrance, from the port alleyway to the engine room?

A. Unless you went through the fire room.

Q. In reference to the room—do you know where Wynne lived aboard that ship?

A. Yes, sir.

Q. Where was it?

A. Well, there is a break in the house there, and he was in the room next above that.

Q. To get into the engine room from Wynne's room how would you have to go?

A. Well, you could go through the engine room door, that would be right opposite the chief engineer's door, and you could go down through the fire room.

314 Q. Where were the tools kept aboard the steamer "Rosecrans?"

A. Some were kept in the tool room, and we had a kind of a little machine shop room; it was on the middle platform, the tool room was.

Q. What do you mean by middle platform?

A. There is a bottom platform, and the top, where the cylinder heads are, and this was halfway between the two.

Q. Your expression is now as to platforms in the engine room?

A. Yes, sir.

Q. What would be the distance from the deck where the port alley was down to this tool room?

A. Well, as near as I can tell you it is the middle platform; the top platform is a little bit lower than the deck.

Q. And what distance from the top platform to the middle platform, would you say?

A. I should judge ten or twelve feet.

Q. Now, in reference to this door which was opposite to the chief engineer's room, where was this tool room, how close to it?

A. Oh, about 15 or 20 feet.

Q. What kind of tools were kept in this tool room?

A. Well, the ship's tools, like hammers, monkey wrenches, ratchets, drills, and things of that kind.

Q. You were familiar with the tools aboard that ship, were you?

A. Yes, sir.

Q. I show you this hammer (showing hammer previously marked for identification) and ask if you have ever seen that before?

A. To the best of my ability I think I have, on account of this handle here; I remember telling either one of the oilers or the water tender to put in a new handle.

Mr. THOMPSON. Move it be stricken out, what he told the oiler.

The COURT. Deny the motion.

Mr. THOMPSON. Exception.



315 Mr. RAWLINS. Q. The hammer, or the head of the hammer, on this handle that you instructed the oiler to replace, was it similar to the one that is on that handle now?

A. Yes, sir.

Q. You have handled hammers considerably, have you, of this nature?

A. Yes, sir.

Q. What would you, from your experience in the handling of hammers—how are hammers classed, by size, or pounds, or how?

A. Weight.

Q. From your experience in the use of hammers of different kinds, what, in your judgment, would be the weight of that hammer, what would it be known as?

A. About three pounds, I guess, three pounds and a half.

Q. When was it you told this man to replace the handle?

A. I don't know if it was the day we got in or the day before we got in, I couldn't say; it was sometime around that.

Q. Was there a workshop aboard the steamer "Rosecrans"?

A. Yes, sir.

Q. Where was that located?

A. On the starboard side.

Q. When you last saw the hammer that you had this conversation about where was it?

A. I don't remember.

Q. Are you able to state at this time, Mr. Bright, whether this particular hammer was part of the tool kit of the "Rosecrans"?

A. No, sir.

Q. All you can testify to is that the handle is similar?

A. It is similar to the one I remember making the remark about.

Q. And the head of the hammer you remember making the remark about is similar to this one?

A. Yes, sir; that is our regular machinist hammer.

316 Cross-examination by Mr. THOMPSON:

Q. Your regular machinist's hammer, or a regular machinist's hammer?

A. A regular machinist's hammer.

Q. This is the general type of all machinist's hammers of that weight, is it not?

A. Yes, sir.

Q. And the day when you gave instructions about changing this hammer, you don't know; it was either the day you got in or the day before?

A. I couldn't say which it was.

Q. Well, was it either one of them?

A. I couldn't say.

Q. Well, you told Mr. Rawlins it was either the day before or the day you got in?

A. I said I wasn't sure.

Q. Is that merely a conjecture on your part, Mr. Bright?

A. I remember making the remark about the handle; whether it was the day or one day or two days before I could not undertake to say.

Q. May have been a week before you got in?

A. No; because I had only joined the boat in San Francisco.

Q. And how long were you coming down?

A. I don't remember; I should judge—oh, we got here in 8, 9, or 10 days.

Q. The day you got in was regatta day, wasn't it, Mr. Bright?

A. I believe it was; yes.

Q. How long did you stay on board the ship after you got in?

A. I think till about 11 or 12 o'clock; somewhere around there.

Q. And were you on duty while aboard the ship?

A. Yes, sir.

Q. You went ashore, then, about 12 o'clock?

317 A. Yes, sir; somewhere around there; it may have been later.

Q. When you went ashore where did you go?

A. Up to Scotty's.

Q. About 12 o'clock?

A. I wouldn't say the time.

Q. But, whenever it was you left the ship, you went to Scotty's?

A. Yes, sir.

Q. And how long did you stay there?

A. I don't know that.

Q. Well, you said you thought it was between half-past two and three when you saw Wynne there.

A. No, sir; I saw Mr. Wynne there in the evening.

Q. You saw McKinnon there in the afternoon?

A. He and I left the ship together.

Q. And you said it was half-past two o'clock you saw him at Scotty's?

A. Well, whatever time I left the ship. McKinnon and I left the ship together and walked up to Scotty's.

Q. When did McKinnon leave you at Scotty's, if he left you?

A. After we had been there a few minutes.

Q. And that evening you saw Wynne there?

A. Yes, sir.

Q. About what time did you see Wynne there—well, the evening, what does that mean to you, 5, 6, 7, 8, or 9 o'clock?

A. Well, from 5 to 8, I should think.

Q. Well, now, was it early in the evening or the middle of the evening?

A. I can not say; it has slipped my memory.

Q. Where else did you go besides Scotty's that afternoon—anywhere?

A. Yes.

Q. Where else?

318 A. I don't remember; it was around town.

Q. Now from the time you first got to Scotty's until you left Scotty's was how long?

A. I don't know.

Q. The time you were away from Scotty's was how long?

A. I don't know.

Q. You don't know when you got back to Scotty's?

A. No, sir; I didn't pay attention.

Q. You don't know when you left?

A. No, sir.

Q. Your memory is not very clear as to that day, is it?

A. I didn't pay any attention—just going around; I don't know when I left or when I got back.

Q. You don't remember a single place you went?

A. Yes; I can tell one; I was at McCarthy's, I think.

Q. Charley McCarthy's saloon?

A. Yes, sir.

Q. And you went back to Scotty's again?

A. I don't know whether I did or not.

Q. Was it before that that you went to McCarthy's?

A. Before it.

Q. Then you came back to Scotty's because you were there in the evening?

A. Yes, sir.

Q. And do you know any place you went to intervening between Scotty's and McCarthy's?

A. No, sir.

Q. To the best of your recollection you went with McKinnon to Scotty's, from Scotty's to McCarthy's, from McCarthy's back to Scotty's, and then back to the ship—is that right?

A. No, sir.

319 Q. Then where did you go?

A. I don't know.

Q. You do know of going to those places?

A. I remember I was in McCarthy's; I can remember that.

Q. Is that the last you remember?

A. No; I was around town, but couldn't say where.

Q. Now, just before you went to the ship you were at Scotty's?

A. Yes, sir.

Q. And you left Scotty's to go to the ship?

A. Yes, sir.

Q. Now, we have you first located in Scotty's and last located at Scotty's, first in coming off the ship and last in going to the ship, and between them the only place you remember of going to is McCarthy's?

A. Yes, sir.

Q. Do you remember a man by the name of McDonald on the ship?

A. Yes, sir.

Q. Do you remember George Nixon?

A. Yes, sir.

Q. Do you remember Ed. Mearcy?

A. Mearcy?

Q. Yes.

A. I can't remember the name.

Q. Do you remember the electrician?

A. Yes, sir.

Q. Did you see any of them in Scotty's?

A. I saw McDonald, and I think the electrician was there, too, but I couldn't say; I remember McDonald.

Q. Did you see Nixon?

A. I don't know.

Q. If he had been there you would have seen him?

A. I might.

320 Q. He wasn't with Wynne at the table, was he?

A. I couldn't say.

Q. Do you remember where Wynne sat on that occasion?

A. No, sir.

Q. Do you remember anything about the way the cafe was arranged at that time; you said you were in the cafe, didn't you?

A. No; I think I was out where the bar is.

Q. Oh, you meant the outer portion of the cafe?

A. Yes, sir.

Q. Do you remember anything about the manner of the arrangements of the bar?

A. Well, just the same as it is now.

Q. Well, tell us how it is now.

A. Well, there is some tables there and the bar is away from the door; got a screen around it.

Q. And are the tables now just as they were at that time?

A. As near as I remember.

Q. Do you remember which table Wynne was at?

A. No, sir.

Q. Do you remember which table you were at?

A. No, sir.

Q. You don't remember very much about that, do you?

A. No, sir.

Q. What kind of a day was it when you got in, do you remember?

A. About like this, I guess.

Q. A clear day?

A. Yes, sir; to the best of my ability; I don't remember much about it.

Q. Well, now, the best of your recollection in regard to the kind of a day it was when you came in the harbor?

A. Yes, sir.

Q. A clear morning?

321 A. Yes, sir.

Q. And during the day it was clear, was it?

A. Well, I think so.

Q. You don't remember very much about the day, do you?

A. Well, I can't recollect that day.

Q. Do you remember when you got in; was this your first trip here?

A. No, sir.

Q. You remember coming in it was clear; do you remember when you left the ship whether it was clear or not?

A. I don't remember.

Q. When you got back aboard do you remember whether it was clear or not?

A. No, sir.

Q. Do you remember anyone else who was in Scotty's cafe or the saloon part of it, that evening, other than the one whom you have mentioned?

A. Yes, sir.

Q. Who?

A. I remember Livingston.

Q. Guy Livingston?

A. Yes, sir.

Q. Little Guy Livingston?

A. Yes, sir.

Q. What was he doing in there, do you remember?

A. He was with me.

Q. Did you know him well?

A. Well, I had met him down here six or seven years before.

Q. Kind of renewing the acquaintance?

A. Yes, sir.

Q. Anyone else with you?

A. Not that I know of.

Q. What is that?

322 A. Not that I recollect.

Q. Then you and Guy Livingston—did he go to McCarthy's with you?

A. I couldn't say.

Q. You think you went up there alone?

A. I haven't any idea at all.

Q. You say that when you spoke to Mr. Wynne he had had a few drinks?

A. I think he had; yes, sir.

Q. When you say a few drinks, what do you mean?

A. Well, he had a couple; I had had a few myself.

Q. Well, the expression "he had had a few drinks," by that you mean you could tell he had had a few drinks?

A. Yes, sir.

Q. And by the expression that "you had had a few drinks yourself," you mean it could be told on you, is that the idea?

A. Yes, sir.

Q. That was either early or late in the evening, you don't remember which?

A. No; I do not.

Q. May have been 5 or it may have been 9?

A. Yes, sir.

Q. You couldn't tell?

A. No, sir.

Mr. THOMPSON. That's all.

By a JUROR (Mr. Lucas). Q. Were you sober?

A. No, sir; I don't think I was.

Mr. LUCAS. Q. Do you remember when you got aboard the ship; did you know what you were doing when you got aboard the ship that night?

A. Yes, sir.

Mr. LUCAS. Q. Were you perfectly rational?

A. I don't know about perfectly, but I could take care of  
323 myself all right.

Mr. LUCAS. Q. Did you steer yourself all right?

A. Yes, sir. I remember working over Mr. McKinnon.

Mr. RAWLINS. That's all.

324 LAMBERTIUS VISSER, called as a witness on behalf of plaintiff,  
being duly sworn, testified as follows:

Direct examination by Mr. RAWLINS:

Q. What is your full name, please?

A. Lambertius Visser.

Q. And what business do you follow, Mr. Visser?

A. Quartermaster.

Q. How long have you been following the sea?

A. Seven years.

Q. I will ask you if you know the steamship "Rosecrans?"

A. Yes, sir.

Q. Have you ever been a member of her crew?

A. Yes, sir.

Q. When did you first go aboard of her?

A. I think July, 1907.

Q. And when did you quit the "Ros'crans?"

A. October, 1907.

Q. Where did you leave her, here or on the coast?

A. Here.

Q. Were you aboard of her in the month of September, 1907?

A. Yes, sir.

Q. I will ask you if you know a man by the name of Reed?

A. Yes, sir.

Q. Was he aboard the "Rosecrans" at the time you were?

A. Yes, sir.

Q. What position did he hold?

A. Second officer.

Q. I will ask you if you knew a man by the name of McKinnon?

A. Yes, sir.

Q. Was he aboard the "Rosecrans" while you were there?

A. Yes, sir.

325 Q. What position did he occupy aboard the ship?

A. Third assistant.

Q. Third assistant what?

A. Third assistant engineer.

Q. And do you know the defendant, Wynne?

A. I do.

Q. Did you know him aboard the "Rosecrans?"

A. Yes, sir.

Q. What position did he occupy aboard the ship?

A. Oiler.

Q. How long were you on that ship with McKinnon?

A. Three or four months.

Q. And how long were you aboard with this man Wynne?

A. A month and a half.

Q. Do you know what quarters McKinnon occupied aboard the ship?

A. Yes.

Q. Where were they?

A. The third room in the alleyway.

Q. In what alleyway?

A. The port alleyway.

Q. Was this alleyway on the main deck, or below?

A. On the main deck.

Q. Where did Wynne live aboard the ship?

A. In the same alleyway.

Q. What room?

A. Fifth or sixth, I am not certain; fifth room.

Q. The same house, or a different house?

A. Different.

Q. And how far away was Wynne's room from the room occupied by McKinnon?

326 A. It was the baker's shop, and the ice room, and then this space for the coal, and then you get to Wynne's room.

Q. Was Wynne's room nearer the bow of the ship than McKinnon's?

A. Yes, sir.

Q. Where was the gangway—do you remember the night that Wynne was taken away from the "Rosecrans?"

A. Yes, sir.

Q. Where was the gangway placed from the dock to the deck of the "Rosecrans" on that night?

A. Just before you get to the alleyway, on the same side.

Q. Near the stern of the ship or near the bow?

A. Near the stern.

Q. Were you aboard the "Rosecrans" that night?

A. Yes; I was on watch.

Q. Who else was on watch with you?



A. The second officer and one more quartermaster.

Q. What time did you go on watch?

A. Six o'clock.

Q. Did you see McKinnon that night?

A. Yes, sir.

Q. Where did you first see him?

A. Coming aboard.

Q. About what time was that?

A. About eight o'clock, quarter past eight, I don't know exactly.

Q. Somewhere around 8 o'clock, or quarter past eight; where were you at the time you saw him come aboard?

A. By the gangway.

Q. Standing there or sitting there?

A. I was sitting down on the winch.

Q. And how near to the gangway was the winch?

A. From here to the table. [Pointing.]

Q. To the stenographer's table?

327 A. Yes; to that table there. [Indicating about seven feet.]

Q. Was there a light at the head of the gangway?

A. Yes; right above the gangway.

Q. Did anybody come aboard with McKinnon?

A. No.

Q. Did he speak to you or you speak to him?

A. No.

Q. After he got to the head of the gangway did you see him do anything?

A. He went and talked to the ice man.

Q. That is, McKinnon?

A. No; Billy Stahle.

Q. McKinnon spoke to the ice man?

A. Yes.

Q. How long was he there with him?

A. About five minutes.

Q. Did you see where he went after he left the ice man?

A. Yes; he went to his room.

Q. Did you see him go to his room?

A. Yes, sir.

Q. Did you see Wynne that night?

A. Yes, sir.

Q. Where did you first see him?

A. Coming over the gangway.

Q. Did he come before or after McKinnon?

A. After.

Q. Had you seen Wynne during the day?

A. Yes, sir.

Q. Where did you see him?

A. On board, 9 o'clock that morning.

Q. Did you see him after 9 o'clock?

328 A. Yes; I saw him at 12 or half-past 12 o'clock.

- Q. Did you see him later than 12 o'clock?  
A. Yes; at night again.  
Q. Well, before you saw him that night, had you seen him in the afternoon?  
A. No; I don't remember.  
Q. Now, how long after McKinnon came aboard the ship did Wynne come on?  
A. About half an hour.  
Q. Where were you when Wynne came aboard?  
A. On the winch.  
Q. In the same place you were when McKinnon came?  
A. The same place.  
Q. Was there anybody there with you?  
A. Yes, sir.  
Q. Who was it?  
A. Jack Kidder was there.  
Q. Did Wynne say anything to you when he came aboard?  
A. No.  
Q. Was the light still burning?  
A. Yes, sir.  
Q. And there was no mistake about who the man was that came aboard?  
A. No.  
Q. After he got on the deck where did he go?  
A. In his room, through the alleyway; I could see through the alleyway.  
Q. Did he go right from the gangway into the alleyway, or up the deck into the alleyway?  
A. Right in.  
Q. And from the position you were occupying could you see in the alleyway?  
329 A. Yes; the end of the winch looks right into the alleyway.  
Q. Was there a light in the alleyway?  
A. Yes.  
Q. And you saw Wynne go into the alleyway, and did you see him go into his room?  
A. Yes, sir.  
Q. Now, after Wynne went into his room and after McKinnon had gone into his room, did you have occasion to go into that alleyway at all?  
A. Yes; I just went into the room for a smoke.  
Q. In what room?  
A. My room; that is two doors further.  
Q. Further than what room?  
A. Than Wynne's room.  
Q. What time was it when you went in to get this smoke?  
A. About quarter to nine.  
Q. How long after Wynne had come aboard?  
A. A couple of minutes.

Q. And did you go into the alleyway from that entrance near the gangway?

A. Yes; the same place I was.

Q. And did you have to pass the room of McKinnon?

A. Yes, sir.

Q. Did you see McKinnon when you passed his room?

A. Yes; I saw him.

Q. Where was he?

A. In his room.

Q. What part of his room?

A. On the sofa.

Q. Sitting down or lying down?

A. Lying down.

Q. Where was his head?

330 A. By the door.

Q. And did you speak to him on that occasion?

A. No.

Q. Do you know whether he was asleep or awake?

A. He was awake.

Q. And did you see Wynne?

A. Yes, sir.

Q. Where was he?

A. Standing up in his room.

Q. In his own room?

A. Yes, sir.

Q. And what was he doing at the time you saw him?

A. I didn't notice that, exactly.

Q. Well, how long were you in your room?

A. About two or three minutes.

Q. Did you finish your smoke in there?

A. Yes; you couldn't smoke on deck; I finished in the room.

Q. And when you finished your smoke and started back, where did you go—to the winch again?

A. Yes, to the same place.

Q. On your way out did you see Wynne?

A. I didn't notice, I just passed by; it might be, I don't know.

Q. Did you see McKinnon?

A. Just passed by.

Q. On your way out when you passed McKinnon's room, did you see him in the room?

A. I didn't see him then.

Q. Did McKinnon or Wynne say anything to you, when you passed in the alleyway?

A. Nothing.

Q. After you got back, did you sit down alongside the winch again?

A. Yes, sir.

331 Q. What was the next thing that attracted your attention?

A. I saw the third assistant going down below, in his working clothes there.

Q. Down below where?

A. Engine room.

Q. You mean McKinnon?

A. Yes, sir.

Q. Did you see him come out of the engine room?

A. No; I didn't notice that.

Q. You didn't see him come out?

A. No; I see him going down.

Q. What was the next thing after that that attracted your attention?

A. I heard singing out, "I have killed a man," and I saw the chief engineer coming out of his room, and I rushed in the alleyway, and the chief engineer looked inside and ran right back again, and I went in the room and I saw Wynne standing outside.

Q. The first thing that attracted your attention was, "I have killed him?"

A. Yes, sir.

Q. And then you saw the second assistant—

A. No, the chief engineer ran out his room towards the third assistant's room, and he looked in and turned right back, and I rushed in.

Q. When you rushed in, did you see Wynne?

A. Yes; he was standing outside, "I have killed him; I have done it."

Q. Outside where?

A. Outside the room; just outside the door.

Q. Outside of whose door?

A. McKinnon's door.

Q. In the alleyway?

332 A. In the alleyway.

Q. Now, when you went into the room, Visser, was there anybody else in there?

A. Not that time. I ran right back again, too; I went to call the captain.

Q. When you went into the room the first time, before you called the captain, just tell what you saw there.

A. Well, I see lots of blood and see the hammer.

Q. Where did you see the blood?

A. Lying on the floor and against the walls.

Q. Yes?

A. Yes, sir.

Q. Now, you say there was a settee in the room; how near the settee was this wall that the blood was on?

A. Right against it.

Q. Did the settee butt against the wall?

A. Yes, sir.

Q. And was there anybody on the settee?

A. Yes, the third assistant.

Q. McKinnon?

A. McKinnon.

Q. And you say you saw a hammer?

A. Yes, sir.

Q. What kind of a hammer was that?

A. Machine hammer.

Q. Did you handle the hammer at that time?

A. Yes; I put it somewhere; I threw it on the floor or somewhere, or on the bureau; I don't know.

Q. You took hold of it?

A. Yes, sir.

Q. And when you took hold of it, where was the hammer?

A. On his chest.

333 Q. On whose chest?

A. McKinnon's.

Q. Would you know that hammer if you saw it again?

A. Yes.

Q. I will ask you to take a look at that. (Showing hammer marked "1 for identification.")

A. Yes; that is the one.

Mr. RAWLINS. We offer it in evidence.

Mr. THOMPSON. No objection.

(Received in evidence and marked "Government's Exhibit 1.")

Mr. RAWLINS. Q. After you called the captain, Visser, what did you do?

A. I ran right back again.

Q. Was anybody in the room?

A. Yes; the second mate, Reed, was there at the time.

Q. What did you do then?

A. I took a tin off the washstand and went for ice water.

Q. Did you go back?

A. Right away; as soon as I got the ice water I came back.

Q. To McKinnon's room, did you?

A. Yes, sir.

Q. What did you do then?

A. Reed was washing him, and I went for another tin of water.

Q. Did you go back with that one?

A. Yes.

Q. What did you do then?

A. I went inside and helped Reed.

Q. What was you and Reed doing there?

A. Washing his head.

Q. Did you see the wounds on McKinnon?

A. No, I didn't see it here; it was on that side of the face.

334 Q. Where were the wounds, on his head or on his body?

A. On his head.

Q. Now, how long were you in there with Reed, working over him?

A. A couple of minutes.

Q. And what was done then?

A. Then the captain came in from the "Marion Chilcoat."

Q. Do you know what his name is?

A. Madeson.

Q. Do you know how he spells his name?

A. No; I don't know exactly.

Q. Well, after he came in there what was done?

A. Reed and me carried him outside on the deck.

Q. What did you do out there?

A. The same; washed him; and the first assistant took his shoes off.

Q. What else was done—well, you say you got him out on deck and washed him again and his shoes were taken off. After you got his shoes off what was done with McKinnon, if anything?

A. We brought him to the hospital.

Q. Did you go to the hospital with him?

A. Yes.

Q. And did you see him up there at the hospital?

A. Yes.

Q. Did you see him inside the hospital?

A. Yes.

Q. Did you see his dead body?

A. He wasn't dead then, the doctor said.

Q. How long did you stay at the hospital?

A. Oh, about a minute; I couldn't see it; they made me stay outside.

Q. Where was Reed at that time?

A. He stayed inside.

Q. Did you see Reed come out?

335 A. Yes; we went home together.

Q. Now, this hammer—when you took it off the chest of McKinnon, what was its condition?

A. Whose condition?

Q. The hammer. What was the condition of the hammer; how did it look?

A. Bloody.

Q. Where was the blood?

A. Well, I didn't notice that; I was too much excited.

Q. But you could tell from looking at it at that time that there was blood on it, was there?

A. Yes, sir.

Q. When you took the hammer off of McKinnon's chest, what did you do with it?

A. I don't know; I put it on the floor or somewhere; I put it—I don't know whether the floor or the washstand.

Q. You put it in that room, did you?

A. Yes; I left it there.

Q. Now, this blood that you saw on the wall alongside of the settee, was it near the door or back of the room, towards the back of the wall?

A. The settee is like that (showing); it was on the wall and on the floor.

Q. All over where?

A. On the floor and wall and on the settee.

Q. Now, where—you say that McKinnon's head was near the door?

A. Yes, sir.

Q. Now, how near McKinnon's head were these spots on the wall, of blood?

A. I don't know that exactly.

Q. Was there a large amount of blood or a small amount of blood?

A. Large.

336 Q. How far away from McKinnon's door was Wynne when you saw him on this occasion that you rushed into the alley-way?

A. Right by the door.

Q. Outside the door?

A. Yes; just from here up to there. (Pointing.)

Q. And did he say anything when you got close to him?

A. No; but he was saying "I killed him, I killed him," that's all I heard.

Q. "I have killed him, I have killed him?"

A. Yes, sir.

Q. What flag did that ship fly?

A. American flag.

Mr. THOMPSON. Same objection, and move that the answer be stricken out.

The COURT. Overruled.

Mr. RAWLINS. Q. And was she afloat in Honolulu Harbor?

A. Yes, sir.

Cross-examination by Mr. THOMPSON:

Q. Mr. Visser, you say you were on the boat about three months?

A. Three or four months.

Q. All the time as quartermaster?

A. Yes, sir.

Q. On the day that the "Rosecrans" came in—it was September 20th, wasn't it?

A. I don't know; the 19th or 20th.

Q. It was regatta day, wasn't it?

A. Yes, sir.

Q. Were you ashore all that time?

A. No.

Q. You were aboard all that day?

337 A. I was a couple of hours ashore.

Q. When did you go on watch on that day?

A. Twelve o'clock.

Q. At noon?

A. Yes, sir.

Q. Then you were on till four?

A. No, to six.

Q. And then when did you go on again?

A. No. I was below from 12 to 6; 6 o'clock I went on watch.



- Q. Then you went on watch at 12, did you?  
A. No, I went off at 12.  
Q. You went on watch at 6?  
A. Yes.  
Q. You stated on direct examination that you saw Mr. McKinnon come aboard?  
A. Yes.  
Q. What time was that?  
A. 8 o'clock, about.  
Q. About 8 o'clock at night, and you were then on watch?  
A. Yes, sir.  
Q. How long is your watch, from 6 to 6, or four hours?  
A. 6 to 12 at night.  
Q. And Mr. Kidder was with you, was he?  
A. Yes, sir.  
Q. Was he also on watch?  
A. No; he didn't belong to the ship at that time.  
Q. Oh, he was visiting you?  
A. Yes, sir.  
Q. Was Mr. Kidder visiting you?  
A. Yes, sir.  
Q. How long did he stay there, do you know?  
A. He stayed there till about half past eight, something like that.
- 338 Q. Was he there when McKinnon came aboard?  
A. No; I don't think; Reed he sent for something about that time.
- Q. Was he there when Wynne came aboard?  
A. No.  
Q. Now, you said on direct examination that you saw Mr. Wynne about 9 o'clock on the morning that you came in?  
A. Yes.  
Q. Was he around doing his regular duties then, or was he off?  
A. No. He was drinking something.  
Q. You saw him at 9 o'clock, and he had been drinking?  
A. Yes; he had been on shore.  
Q. When did you see him then?  
A. Around the alleyways and on the deck.  
Q. You say he had been drinking; what was his condition?  
A. I could see on his walk he had been drinking.  
Q. Was he unsteady on his feet?  
A. Yes.  
Q. Did you speak to him?  
A. No.  
Q. You saw him again at 12.30?  
A. Yes.  
Q. What was his condition then?  
A. About the same.

Q. Unsteady on his feet?

A. Yes.

Q. Did you talk to him?

A. No.

Q. How did he look?

A. As if he had been drinking.

Q. Did he look as if he were drunk?

A. Yes.

Q. Now, when he came on board ship again at about 9 o'clock, you say the cluster light was lit when he came on board?

339 A. Yes, sir.

Q. How far were you sitting from the gangway?

A. From here about to you.

Q. The distance of about ten feet? (To Mr. Rawlins.)

MR. RAWLINS. Yes.

Q. This cluster light, of what does it consist?

A. Electric light.

Q. Was it one electric globe or more than one?

A. I think it was one.

Q. One large globe?

A. Yes.

Q. And did it hang up over the gangway?

A. Yes.

Q. So when a person passed under the gangway it was easy to see him?

A. Yes.

Q. Could you see him coming up the gangway?

A. Yes.

Q. When you saw Wynnie coming up the gangway how did he appear to you then?

A. I could see he had been drinking; he didn't walk steady.

Q. Was he reeling around?

A. Not rolling, but could see he had been drinking; hitched from one side to the other.

Q. When he came across the gangway and went into the ship did you pay any attention to it?

A. No.

Q. When he went into the alleyway did you see how he was?

A. Yes.

Q. Was he drunk or sober?

A. He had been drinking; drunk, I would say.

Q. And when he went down the alleyway did you notice him going down there?

340 A. Yes.

Q. How did he look then?

A. The same way.

Q. He was reeling around, was he?

A. He didn't walk steady.

Q. Now, when you saw him come out of the room, or when you saw him by the room, did you pay any particular attention to him then?

A. No.

Q. You were pretty excited then?

A. Yes.

Q. You heard him say, "I have killed him, I have killed him?"

A. Yes.

Q. Now, repeat just the exact words?

A. "I killed him, I killed him; I am the one that done it."

Q. And he waved his hands around in the air?

A. Yes.

Q. Did you see him then?

A. Yes.

Q. How did he look?

A. Like wild.

Q. You have known Mr. Wynne for some time, haven't you?

A. A month and a half.

Q. During that time have you known him quite intimately?

A. No.

Q. Just seen him as a shipmate?

A. Yes; he used to live forward for about a month.

Q. And you lived aft?

A. Yes; a half a month he was living in the alleyway.

Q. Well, from what you saw of him, did he appear the same at that time or different from what you saw him before?

A. Different.

341 Q. And will you describe to the jury how he looked; you said he looked wild?

A. The way he was standing, with his hands up like that [showing], "I am the one that done it," like a crazy man.

Q. And how did his eyes look?

A. I said to him, "Be quiet," and he said, "No, no;" you could get nothing out of him, he hollered, "I killed him, I done it."

Q. And then where did he go, Mr. Visser?

A. He was standing in the same place, aft.

Q. Didn't try to get away?

A. No.

Q. Just stood there?

A. Stood at the same place.

Q. Same place; did anybody place their hands on him?

A. Not before I came back, and the chief officer called the captain, but he was standing there just the same.

Q. Was he standing there?

A. Yes.

Q. By the pin rail?

A. Yes, by the pin rail on the main deck.

Q. His hands on the pin rail?

A. I don't know; I was working then with the man.

Q. Was he looking aboard ship or looking towards the dock?

A. No; he was talking to the captain or officer or anybody around there, saying he wouldn't run away and all that, and the time we were washing him the second mate was down below, and he grabbed the second mate around the neck and said, "Yes, Jimmie, I killed him; I am the one that done it."

Q. Jimmie Reed, the second officer?

A. The second officer.

Q. How long after he came aboard was it that this occurred?

A. I don't know.

342 Q. Just the length of time it took you to go and fill your pipe?

A. It may be something like ten minutes; something like that.

Q. Not over ten minutes?

A. No.

Redirect examination by Mr. RAWLINS:

Q. In the morning when you saw Wynne he was able to navigate, was he?

A. Yes; he could walk.

Q. And what part of the ship did you see him in?

A. On the main deck.

Q. Aft or forward?

A. Aft; the main deck is aft.

Q. It is all aft there, is it?

A. Yes.

Q. Now, how near to the alleyway was he when you saw him in the morning?

A. Oh, about from here to you, close to; I was working around there, washing the tanks.

Q. What was he doing up there?

A. Nothing; walking around from one side to the other and talking to everybody.

Q. Walking about the ship?

A. Yes.

Q. He was able to walk around all right?

A. Yes.

Q. Did you see him go ashore?

A. No; I didn't notice that.

Q. Did you see where he went from that place?

A. No, sir.

Q. Did he talk to you?

A. No, sir.

343 Q. You don't know whether or not he went ashore or remained aboard the ship, do you?

A. No.

Q. Did you see him go aboard the ship that morning?

A. No; I didn't see him come.

Q. Do you know whether or not he had been ashore that morning?

A. Yes; he had been.

Q. How do you know?

A. Well, I heard it from fellows he had been drinking, and I could see that.

Q. So what you testified to about his drinking is what you heard somebody else say?

A. No; I could see he had been drinking. He wasn't like before; he had always been quiet.

Q. Now, when he started for a place across the deck, he would get there, would he?

A. Yes.

Q. And he had no difficulty in getting across the deck, had he?

A. No.

Q. No difficulty at all. And you don't know whether or not he went anywhere or not, forward or into the alleyway, into his quarters, or went ashore after that?

A. No.

Q. Now, at 12.30, when you saw him, where was he at that time?

A. Then I see him coming aboard again.

Q. What kind of a gangway was this that you had?

A. Just a common gangway.

Q. Steep gangway?

A. No; about that wide [showing], about 15 feet long.

Q. Was it steep?

A. No; something like that. [Showing angle.]

Q. He came up the gangway all right, did he?

344 A. Yes; all right.

Q. He wasn't—there wasn't any difference between him at that time and when you had seen him in the morning, was there?

Mr. THOMPSON. Submit the question is leading.

Mr. RAWLINS. Withdraw the question. Was there any difference in his condition when he came aboard that steamer at 12.30 than when you had seen him in the morning?

A. Yes; he had been drinking more then.

Q. Was he able to walk up the gangway?

A. Yes, but not walking straight.

Q. Where did he go then?

A. I didn't notice it; around the deck, maybe.

Q. Did you see him go ashore again?

A. No; I went in my room then for to sleep.

Q. Now, when he came aboard in the evening he was able to come up that gangway by himself, was he?

Mr. THOMPSON. Object to it as leading.

Mr. RAWLINS. Withdraw the question. Q. Did he come aboard by himself?

A. Yes, sir.

Q. Did he go into the alleyway by himself?

A. Yes, sir.

Q. Did he go into his room by himself?

A. Yes, sir.

Q. And did he call any person by name?

A. No.

Q. What did you say about him calling "Jimmie?"

A. That was after the thing happened.

Q. How long after?

A. After the case happened; I don't know how long, it may be ten minutes or fifteen.

Q. And when he called "Jimmie," who was he speaking to?

345 A. The second mate, Jimmie Reed; he clasped him around the neck.

Q. When he called "Jimmie" is that the name Reed had been called by before?

A. No; never called him that; always "Mr. Reed." The first time he called him Jimmie.

Q. His name is James Reed, isn't it.

A. Yes; but he always called him Mr. Reed.

Q. Did he call you by name?

A. No.

Q. Did he call any other person's name?

A. No.

By a JUROR (Mr. Lucas). Q. When you went back there to take your smoke did you say he was in his room there, lying down?

A. I didn't notice that; you couldn't see it when you came back; there is a little piece of wall, you see, about that size [showing], where the settee is, and you pass that you can't notice it; only when you go in.

Q. Was there a light in his room all the time?

A. Yes, sir.

Q. In McKinnon's room also?

A. Yes, sir.

Mr. RAWLINS. That's all.

Mr. THOMPSON. That's all.

346 FRANK COKER, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. RAWLINS:

Q. What is your full name, please?

A. Frank Coker.

Q. How long have you lived in Honolulu, Mr. Coker?

A. I have been here three years and over.

Q. During the month of September, 1907, where were you employed?

A. The Royal Annex.

Q. Commonly known as "Scotty's?"

A. Yes, sir.

Q. I will ask you if you know a man by the name of A. F. McKinnon?

A. Yes, sir.

Q. I will ask you if you know this defendant?

A. Well, I wasn't very well acquainted with him; I have seen him.

Q. Do you remember the occasion of the trouble aboard the "Rosecrans?"

A. I heard of it; yes, sir.

Q. On that night I will ask you if you saw McKinnon?

A. Yes, sir.

Q. Whereabouts, Mr. Coker?

A. Oh, he came in the saloon about 7 o'clock, a little after 7, perhaps.

Q. And how long did he stay there?

A. Only stayed there half an hour, three-quarters of an hour.

Q. And what was he doing there during that time?

A. He had a couple of drinks of Bartlett water.

Q. Did you engage in any conversation with him?

A. Well, no; only asked him "What are you drinking Bartlett water for?" he says—

Mr. THOMPSON. Object to what he said.

Mr. RAWLINS. Q. Never mind the conversation; you talked with him?

347 A. Yes; I was talking with him.

Q. What time would you say it was when he left there?

A. Oh, it must have been close to 8 o'clock.

Q. Was anything said as to where he was going?

A. He told me he was going aboard.

Mr. THOMPSON. Move it be stricken out as hearsay.

The COURT. The motion is allowed.

Mr. RAWLINS. Q. Did you see in what direction he went when he started out of the place there?

A. No, I didn't.

Q. Do you know a man by the name of Bright?

A. Yes, sir.

Q. Did you see him in there on that night, in Scotty's?

A. Yes, sir.

Q. What time did he come in there?

A. Oh, I should judge about half-past eight, or quarter after eight.

Q. What time did you see this defendant in there?

A. He came in a few minutes afterwards.

Q. Few minutes after who?

A. After what's-his-name—after Bright.

Q. Did Bright and this defendant sit together in there?

A. No, sir.

Q. Where was Bright sitting at the time this defendant came in?

A. He was sitting, as you come in, over to the left, at one of the tables.

Q. And where did this defendant go after he came in?

A. He went to the right.



Q. Now, did he occupy the same table with Bright?

A. No.

Q. How close were they sitting?

A. Oh, about ten feet.

348 Q. Now, after Wynne came in there was there anything unusual occurred in reference to Wynne and Bright?

A. What?

Q. Did anything occur between Wynne and Bright, after they had both got into the place?

A. Yes; they had some trouble in there.

Q. Will you tell us about that?

A. Well, when they came in, Wynne he had two or three with him, they were sitting at this other table, and he speaks up and said something to the first, and Bright told him somebody had to do his work for him—

Q. By the "first" you mean Mr. Bright?

A. Bright; and Bright said he had to have somebody do his work for him; then the defendant started to get up, and a couple of other boys told him to sit down, and they settled—well, they had another drink and when they got up they all went outside, and then came back again, and when they came back Wynne just stayed there a few minutes, and all at once he got up and walked out. Some of them hollered to him "sit down," and one of the other boys spoke up and said, "No, let him go."

Q. Did he say anything when they spoke to him?

A. Never said a word; walked out.

Q. How long had he been in there altogether?

A. I should judge half an hour.

Q. What was his condition as to sobriety?

A. He was all right.

Q. Was he sober?

A. Yes, sir.

Q. You have had a great deal of experience, have you, Mr. Coker, in the business in which you are engaged?

A. Yes, sir; I have had considerable.

349 Q. And you have had occasion to see men under the influence of liquor?

A. Yes, sir.

Q. Men drunk?

A. Yes, sir.

Q. From what you saw of Wynne that night—first, what time was it when he left your place, about?

A. It must have been along about quarter to nine.

Q. Was he drunk or sober at that time?

A. I should call him sober.

Q. Did you see him go out of the door?

A. Yes, sir.

Q. Was he assisted in any way out of the place?

A. No, sir.

Q. This talking back and forth between Bright and Wynne, how long did that last in there?

A. Oh, it lasted a couple or three minutes, when they quit, and then they started in again and stopped after about ten or fifteen minutes; then started in again.

Q. On both of these occasions when they started to talk who commenced the talking?

A. Well, I don't know; I think the first time, I think Bright did; Bright said something to him, and he got up and went over towards Bright, and then some one told him to sit down, and pulled him back.

Q. And on the second occasion when they talked, who commenced that?

A. Well, the second time they two got up and went outside; I told them, "Don't you start any trouble in here, go outside if you want trouble," and they started out.

Q. How long were they out?

A. I should judge a couple of minutes, and then they all came back and sat down.

350 Q. During the time that Wynne and Bright were in the place there, did you serve them with anything?

A. Yes, sir; small beers.

Q. To whom did you serve the small beers?

A. Well, to all of them.

Q. How many small beers did you serve?

A. I should judge maybe five or six.

Q. Five or six rounds, or—

A. Yes.

Q. What was this defendant drinking?

A. Small beer.

Q. Now, Mr. Coker, when you say a small beer will you kindly explain what you mean?

A. A glass of about that size. (Showing)

Q. Did he drink anything else besides small beers?

A. No.

Q. From the conversation that you heard between Bright and this defendant, Wynne, I will ask you whether the statements made by him, or answers given by him, so far as you could judge, or could hear, were to the point of the question asked?

A. I don't understand you.

Q. Well, in his conversation with Bright, was the conversation a ready one, or one which was—in which there was considerable hesitation or reserve?

Mr. THOMPSON. Object to it as leading. All this examination is leading.

Mr. RAWLINS. Q. Was the conversation on the part of this defendant clear and intelligible, or was it hesitating and reserved or unconnected?

A. Well, as I understand, it was clear.

Q. Was it the conversation of a drunk or a sober man?

A. A sober man.

351 Cross-examination by Mr. THOMPSON:

Q. When did you go on watch that day, Mr. Coker?

A. Six o'clock.

Q. Then what you have referred to in your testimony transpired between six o'clock and about half-past eight, as you said?

A. Something like that.

Q. And that is all you know about the defendant Wynne, is it not?

A. Yes, sir.

Q. It was regatta day, was it?

A. I couldn't say as to that.

Q. Was it a Saturday, do you remember?

A. I don't remember the day.

Q. Was it a busy day?

A. Not a very busy day.

Q. Your business was confined largely to the "Rosecrans" men, was it?

A. Yes, sir.

Q. From six o'clock to half-past eight they had five or six rounds of drinks?

A. Yes.

Q. You saw and observed Mr. Bright, did you, during that time?

A. Yes, sir.

Q. What was Mr. Bright's condition?

Mr. RAWLINS. Objected to as improper cross-examination.

The COURT. Objection overruled.

Mr. THOMPSON. Q. What was Mr. Bright's condition?

A. Oh, he had had several drinks.

Q. Beg pardon?

A. He had had several drinks.

Q. What does that mean, was he drunk or sober?

A. Well, he was sober; I would call him sober.

Mr. THOMPSON. That's all.

Mr. RAWLINS. That's all.

352 HENRY ESPINDA, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. RAWLINS:

Q. What is your full name?

A. Henry Espinda.

Q. And what is your business?

A. Police officer.

Q. How long have you been a police officer?

A. About nine or ten years.

Q. Were you a police officer during the month of September, 1907?

A. Yes.

Q. I will ask you if you have ever seen this defendant before?

A. Yes, sir.

Q. Where did you first see him?

A. Down aboard the steamer.

Q. What steamer?

A. "Rosecrans," I think, if I don't make a mistake.

Q. What month was it you saw him?

A. September.

Q. Do you remember the date?

A. On the 20th.

Q. What time that day was it when you saw him?

A. About ten minutes past nine in the evening.

Q. And before you went—how did you happen to go to the steamer "Rosecrans?"

A. Two—one chief engineer and one of the other fellows, I don't know his name, came to the police station and talked to Hart; there is some trouble aboard the ship; wanted the wagon there.

Q. Did you go down; were you sent down?

A. Hart sent me down, me and Puahi and the driver and one trusty on the wagon.

353 Q. How did you go to the ship?

A. Went down in the wagon.

Q. Where did the wagon go, what wharf—withdraw that. Did you get to the ship "Rosecrans?"

A. Yes; we got there.

Q. Did you go aboard of the ship?

A. Yes, sir.

Q. After you got aboard what did you do; what did you see?

A. After I got aboard I see the captain was holding John Wynne, and when I went up the stairs he was standing on the side and the captain pointed to me the man, and I looked and the man there is bleeding, and I felt his pulse, he is breathing all right, and I told Puahi to bring a stretcher; we put him on the stretcher. In his head on the right side there is a big hole in it, and I picked him up and put him on the stretcher and told Puahi to take him to the hospital right away, quick.

Q. Where was this man Wynne when you got on the ship?

A. Standing by the captain; the captain had hold of him.

Q. After they had taken this person away on the stretcher, what did you do?

A. I came up again and took off my handcuffs and handcuffed him, and I told the captain to stay there and watch him, and I go in the room where McKinnon was lying; I saw the blood all over the wall of the ship, on a kind of a settee, on the border; it was lying there all covered with blood. I came back and I took the man down to the police station.

Q. Did you see anything else in that room?

A. I see blood all over, and when I came out the chief engineer passed me the hammer.

Q. What kind of a hammer was it, Espinda?

A. A blacksmith hammer, round, flat end, and top face of the hammer like that.

354 Q. What condition was the hammer in?

A. Full of blood.

Q. Would you know the hammer, if you saw it again?

A. Yes, sir.

Q. Is this it? [Showing Exhibit 1.]

A. Yes, sir; this is the hammer.

Q. Now, on what part of the hammer was the blood?

A. Right on the handle, right here, all over this side, all over the hammer here; there was a hair too on the hammer when I see it, right in this place. [Showing.]

Q. Now, you say that you took charge of the defendant; what did you do with him?

A. I bring him up to the police station, on foot.

Q. How did you go from the ship to the wharf?

A. Walked down; he walked in front, I walked behind, held behind his back, this way.

Q. And when you got on to the wharf where did you go?

A. From there up to the police station.

Q. How did you take him, in the wagon?

A. No, walked up.

Q. Now tell us what way you took to get to the police station?

A. From the wharf down Queen street past the bridge, and he asked me only one word; he asked me if that man is dead; I said no, the man is at the hospital, he is all right; that is all of the talk. He walked with me, on my right side, I was on the left side, and we walked up to the police station. When I got to the police station—

Q. Well, now, I will come to the police station in a few minutes; did this man walk by himself, or did he require assistance from that ship to the police station?

Mr. THOMPSON. Object to it as leading.

The COURT. Sustain the objection.

355 Mr. RAWLINS. Q. How did he walk?

A. He walked straight.

Q. What do you mean by straight?

A. Well, nobody helped him. He walked along with me from the police station; I walked by his side, walked along with me from the police station, nobody, only myself with the defendant, with the prisoner, nobody else.

Q. Now, have you had experience with drunken men?

A. I think I have.

Q. From what you saw of Wynne that night, from the ship to the police station, what would you say, that he was drunk or sober?

A. The man is not drunk; sober. But the man had been drinking, I smelt liquor on him, but he walked along. A sober man. He is sober when I took him up there.

Q. At the time he spoke to you had you spoken to him before that?

A. No, sir.

Q. And what was it he said to you?

A. When I passed the bridge on Queen street he said "That man is dead." I said "No, that man is all right, he is down at the hospital." That is all I said to him or he to me, and I took him right up. We were walking on the street when he talked.

Q. When you got to the station house what did you do with him?

A. When I got to the station house I reported to Lieutenant Hart, "This is the man," and Hart told me to take off the handcuffs, and I took them off, and Hart told him, "What you want to do that dirty work for," and he said "For some reason," and Stephen asked his name, he said "John Wynne."

Q. Who is Stephen?

A. Stephen Parker, he is the clerk that night, he asked his name; he said "John Wynne." Stephen asked again "How you spell the last name?" He spelled the last name "W-y-n-n-e."

Q. How did he spell it?

356 A. "W-y-double-n-e," that's the way he spelled it at the police station.

Q. Now, was it light or dark at the police station when you got him in there?

A. Light.

Q. How close did you stand to him in the police station?

A. Very close.

Q. Did you have an opportunity to look at him there?

A. Yes.

Q. From what you saw of him, could you say whether he was drunk or sober?

Mr. THOMPSON. Objected to as already asked and answered.

The COURT. Overrule the objection.

Mr. THOMPSON. Exception.

A. The man is sober.

Q. Now you say the hammer—was it given to you by the chief engineer?

A. Chief engineer.

Q. And what did you do with the hammer?

A. Brought it up to the station.

Q. Then, what did you do with it?

A. Passed it to Lieutenant Hart, and Lieutenant Hart passed it to the clerk.

Q. After his name was given what was done then, if anything?

A. They took him down to the cell, in the police station.

Q. Who was there at the time he was brought into the police station?

A. Lieutenant Hart, myself, Stephen Parker, the clerk, that is all I remember.

Q. Now, this man Hart that you speak about, has he got any other name that you know of?

A. Kawaauhau.

357 Q. Hart Kawaauhau?

A. Yes.

Cross-examination by Mr. THOMPSON:

Q. Are you in the police department now, Mr. Espinda?

A. Yes, sir.

Q. You say you have been in the police department ten years?

A. I think nine or ten years.

Q. Continuously?

A. Yes, sir.

Q. Under all the different regimes—excuse me, under all the different changes in the heads of the department, have you stayed there?

A. Yes.

Q. You were there under Brown?

A. Yes.

Q. Iaukea?

A. Yes, sir.

Q. And before Brown, with Hitchcock?

A. Yes, sir.

Q. How old are you?

A. Thirty-three.

Q. You were twenty-three years of age when you first went in the police department?

A. About twenty-one or twenty.

Q. And what have been your duties since you have been in the police department?

A. I used to be a special.

Q. What do you mean by a special?

A. Detective work.

Q. During the time you did detective work, were you regularly on the pay roll?

358 A. Yes, sir.

Q. As a special, were you regularly on the pay roll?

A. Yes, sir.

Q. By that you mean you were not paid for the amount of work you did, but a regular monthly salary?

A. Yes, sir.

Q. And always have been, since you have been in the department?

A. Yes, sir.

Q. What is your position now?

A. Bicycle officer.

Q. By bicycle officer you mean you are a detective or a police officer?

A. I was foot police first; came from foot police under Marshal Hitchcock.

Q. And from foot police you have now been advanced to bicycle police?

A. Yes, sir.

Q. The duties of a bicycle policeman are what?



A. Any telephone message from anyone to the clerk, from the clerk to the lieutenant, the lieutenant give me orders to go and I go.

Q. Do you call yourself a detective or a policeman?

A. I am a police officer.

Q. You are on the police branch of it, are you?

A. Yes, sir.

Q. Where was the "Rosecrans" the night that you went down there, do you remember?

A. I think it is the third wharf from, I think, railroad wharf, if I don't make a mistake.

Q. She was in the slip, was she? She was between the railroad wharf and the Hackfeld wharf in the slip?

A. Yes, sir.

Q. You say it was on September 20th; how do you remember the date?

359 A. A case like that, I always put it in my little book.

Q. Have you that little book with you?

A. Yes, sir.

Q. Let me see it?

A. [Hands book to Mr. Thompson.]

Q. Did you refer to the little book before you came in here?

A. A big case like that I always look in my record first, before coming into court.

Q. Well, I ask you, did you refer to the book before you came in here, did you refer to the book before you came in here?

A. Yes, sir.

Q. Did you say "Yes, sir?" Did you refer to the book before you came in here, did you look in the book before you came in here?

A. I never looked in it to-day.

Q. When did you look in it last?

A. Two days ago.

Q. Is that the only reason then that you know it was September 20th, because you looked in the book, is that right?

A. No; it was the records of the book at the police station. I looked it up.

Q. When did you look at the records in the police station?

A. Sometimes I make a mistake—I look in the record.

Q. When did you last look in the records of the book at the police station, in regard to the date?

A. I think some day this month.

Q. What day?

A. I don't remember what day now.

Q. Was it a week ago?

A. Might be a week ago.

Q. Was it two weeks ago?

A. No; might be a week ago.

Q. Without having looked into the record book at the police station would you have known the date? Did you get the question?

360 A. What's that?

(Question read by reporter.)

The COURT. Q. Suppose you hadn't looked in the book at the police station, could you remember the date now?

A. Might be yes, might be no; I can't make it sure.

Mr. THOMPSON. Q. Well, What I want to know is whether September 20th—Mr. Rawlins said "Do you remember the date?" You said "Yes, it was September 20th." Now, what I want to know is if you remember the date as September 20th, or if you got it from the police book or this book that it was September 20th?

A. A case like that one I look in my little book, and I remember the date before I come into court.

Q. Honest and undoubtedly true; but what I want to know is do you remember the date, not because you looked into the books, but in spite of it?

Mr. RAWLINS. Objected to as already asked and answered.

The COURT. Q. That is, if you remember the date outside of the books?

A. I remember the date when I arrested him.

Mr. THOMPSON. Q. Well, what we want to know is the date; you said you remembered it as September 20th; now then, what we are directing this investigation to is how you remember it as September 20th, whether it is because you looked in the books, or that you have some independent recollection on the subject of its being September 20th; can you explain that?

A. When I bring the man down, when he put his name down on the record, September 20th is in the record book, that day is the 20th of September, that day, and from there, that night, I put that in my little book, to remember; see if they call me again I don't refer to the big book, but just look in my little book?

Q. Then you haven't any independent recollection on the subject at all; you just got it from this book?

361 A. From this book, yes.

Q. Without this book you wouldn't know whether it was in July or in September, would you?

A. Oh, I don't know.

Q. Well, I don't know; would you?

A. I don't come up here and tell in September, and it was in July the month I went down there; I want to tell the truth.

Q. Undoubtedly. But where would you get the truth from if you didn't have this book?

A. Well, a big case like this I generally put in my record book.

Q. So you said before; I want to know if you ever put anything in here? (Touching his head.)

A. I think not; I put it in a book.

Q. Without this book you wouldn't know anything at all in regard to the date?

A. I think I know when I look through that book.

Q. What other big case have you been interested in in the past ten years?

Mr. RAWLINS. Object to that, as not proper cross-examination, incompetent, irrelevant, and immaterial.

The COURT. I think it is proper, to test his memory.

Mr. THOMPSON. Q. Can you tell me any other big case you have been interested in?

A. I have no big case.

Q. All right; a little one?

A. Oh, plenty of drunks.

Q. Who?

A. It is down on the record. I never looked before I came up here.

Q. Do you remember anybody that you ever arrested as being drunk, the name of them?

A. Oh, there is many; I don't remember the name.

Q. Don't remember a single name?

362 The COURT. He may not want to give these people away.

Mr. THOMPSON. Well, it is a matter of public record; he didn't seem to be lax in giving others away.

(Here court adjourned until October 28th, at 10 o'clock a. m., and the further hearing of this case was continued until said time.)

#### OCTOBER 28TH, MORNING SESSION.

This case came on regularly at this time for continued hearing. The roll of the jury was called and all were found to be present. Upon the statement of United States district attorney, Robert W. Breckons, that his assistant, Mr. Rawlins, who was trying this case, was ill, the further hearing of this case was continued until October 29th, at 10 o'clock a. m.

#### OCTOBER 29TH, MORNING SESSION.

This case came on regularly at this time for continued hearing. The roll of the jury was called and all were found to be present. Mr. Breckons, U. S. district attorney, stated to the court that Assistant U. S. District Attorney Rawlins was still ill and unable to be present, and upon the consent of Mr. Thompson, counsel for defendant, the further hearing of this case was continued until October 30th, at 10 o'clock a. m.

#### OCTOBER 30TH, MORNING SESSION.

This case came on regularly at this time for continued hearing. The roll of the jury was called and all were found to be present, whereupon the cross-examination of Henry Espinda was proceeded with, as follows:

By Mr. THOMPSON. Q. Espinda, when we adjourned on Wednesday, or was it Tuesday—Tuesday—I handed you a small book; will you hand it back?

A. (Hands book to Mr. Thompson.)

Q. Mr. Espinda, before we adjourned on Tuesday you said in answer to a question of Mr. Rawlins that Mr. Wynne had had several

363 drinks, and in answer to a further question as to how you knew whether or not he had several drinks——

A. (Interrupting.) I didn't say that.

Q. I think the stenographer's notes will show you smelt liquor on him?

Mr. RAWLINS. He said he smelt liquor on him, to my recollection.

The COURT. He said he had been drinking.

Mr. THOMPSON. I have it in my notes, the question was directed—that he smelt it on his breath; you have had a good deal of experience with drunk men have you, Mr. Espinda?

A. I think so.

Q. Now, what did you smell on his breath; what kind of liquor, can you tell?

A. I couldn't tell what kind of liquor; might be gin or whisky.

Q. It was either gin or whisky that you smelt on his breath?

A. Yes.

Q. Smelt pretty strong?

A. Yes; pretty strong.

Q. Must have been, or you wouldn't have noticed it?

A. Yes.

Q. You made no particular effort to notice whether or not he had been drinking whiskey or gin?

A. No.

Q. Just a whiff of it came to you as you were taking him up town?

The WITNESS (to the Court). Well, Judge, I want it translated into Hawaiian; in the English language I can't catch all of it.

(Question translated into Hawaiian.)

A. I smelt it on him.

Q. When did you smell it on him, Espinda?

A. When I was down on the boat.

Q. When you first came on the boat you smelt it on him?

A. When I put on my handcuffs I smelt liquor on him, that is all.

Mr. THOMPSON. That's all.

Mr. RAWLINS. That's all.

364 HART KAWAAUHAO, called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. RAWLINS:

Q. What is your name?

A. Hart Kawaaauhao.

Q. What is your business, Hart?

A. Lieutenant of police.

Q. How long have you been lieutenant of police?

A. More than nine years.

Q. And how long have you been connected with the police department?

A. About thirteen years.

Q. Thirteen years?

A. Yes.

Q. Were you on the police force in September last year, 1907?

A. Yes, sir.

Q. I will ask you if you know a man by the name of Henry Espinda?

A. Yes, sir.

Q. I will ask you if you have ever seen this defendant before?

A. Yes, sir.

Q. Where did you see him, Hart, the first time?

A. Down at the police station.

Q. And when was it, if you remember?

A. September 27th—I mean 20th, Friday evening.

Q. What time was it when you first saw him?

A. About twenty-five minutes after nine.

Q. And how did he happen to be there in the police station at the time you saw him?

A. How it happened?

Q. How did he get up in the police station at that time?

A. Well, he was brought by Espinda.

Q. Now, who else was in the police station when he came there with this man?

A. Only Espinda alone brought him down.

Q. Do you know where Espinda brought him from?

A. From the steamer "Rosecrans."

Q. And how did he bring him, do you know?

A. They came on foot.

Q. Now, when he came into the station house, did you say anything to this man or did he say anything to you?

A. When Espinda brought him in on foot the man has got handcuffs on, and I told Espinda to take it off; after Espinda took it off, then I asked the fellow "What you wanted to do this dirty work?"

Q. Yes?

A. And he answered me, "For something." And Stephen asked his name and he said "John Wynne." And Stephen asked again his last name and he spelled it "W-y-n-n-e," and I sent a turnkey to lock him up and take him below. After the turnkey took him I sent him down to the cell.

Q. When Stephen Parker asked him what his name was, what did Wynne do then?

A. Oh, he gave his name; he gave his name, "John Wynne."

Q. Yes?

A. And Stephen didn't understand the last name, and Stephen called him up again, "What's your last name?" and he spelled it, "W-y-double-n-e."

Q. After you sent him down to the cell did you see him again that night?

A. I only saw Koloa taking him. I called to put him in the first cell.

Q. Did you see Wynne after that, after they took him downstairs?

A. No; I never been there.

Q. Now, when Stephen Parker asked him what his name was the second time, did he answer right away or take a long time?

366 A. Answered right away.

Q. And this time he spelt his name, did he take a long time before he spelt it?

A. No.

Q. You have had a good deal to do with drunken men down there, haven't you, Hart?

A. Yes, sir.

Q. From what you saw of this man that night what would you say, that he was drunk or sober?

A. Well, he was sober; a drunk man somebody hold him.

Q. Do you know whether he had been drinking or not?

A. Well, he was drinking, I smelt liquor when he came in; but he not drunk.

Q. What way—how did Henry Espinda bring him into the police station when you first saw him; how were they coming?

A. He let the man walk, Espinda alongside of the man, took him inside the office, that's all.

Cross-examination by Mr. THOMPSON:

Q. What kind of a liquor did you smell on him, Hart?

A. Well, I couldn't tell that. I smelt liquor, I couldn't tell what liquor he took.

Q. Whisky?

A. Maybe whisky or gin.

Q. Now when do you think a man is drunk, Hart; you say he wasn't drunk; when do you consider a man drunk?

A. A man is drunk if he is paralyzed, don't know what to do.

Q. Then if a man isn't paralyzed, then you don't think he is drunk?

A. I don't think drunk if he no paralyzed.

Mr. THOMPSON. That's all.

By a JUROR (Mr. Lucas). Q. Say, Hart, what was your impression of that man when he came in there?

367 Mr. THOMPSON. Object to that question, asking for the impression of the witness; the jury are the ones to draw their own impressions.

Mr. LUCAS. That is what I want to find out, how he looked.

Mr. RAWLINS. Submit the question is proper.

Mr. THOMPSON. It is a conclusion of the witness; any fact I am willing to have testified to.

The COURT. He has already testified that the man was sober. Is that a conclusion of the witness?

Mr. Thompson argues.

The COURT (to Mr. Thompson). Q. If he asked him what was his impression when he came in, as to his condition as to being drunk or sober, would you object to that?

Mr. THOMPSON. I think not; but to the general question, that brings in a general impression—

Mr. LUCAS. That's what I want to know, Judge.

Mr. RAWLINS. Submit the question as asked is proper.

The COURT. Well, the juryman who has asked the question is satisfied with the other question.

Mr. LUCAS. My idea was this, to get from the witness his idea of the man's sobriety, whether he was in his sober senses or not.

The COURT (to witness). Q. He wants to know how the defendant impressed you when you first saw him, as to his condition in regard to his sobriety.

A. He is sober.

By a JUROR (Mr. von Damm). Q. When he spelled his name did he impress you that he was spelling it under the influence of liquor, or readily, absolutely sober?

A. Well, when he came in he was sober, entirely, and he spelled his name, nobody helped him, he spelled his own name.

Mr. RAWLINS. That's all.

368      STEPHEN PARKER, called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. RAWLINS:

Q. What's your full name?

A. Stephen Parker Waipa.

Q. What is your business?

A. Clerk in the receiving station, police station.

Q. How long have you been clerk there?

A. About over a month, now.

Q. On other occasions have you ever acted as clerk there?

A. I was clerk in 1907, in the month of September, by David Kamana's place, he was on vacation of fifteen days.

Q. What part of September were you clerk, first or last part, during what days in September?

A. I remember the last two weeks in September.

Q. How long have you been a member of the police force?

A. Five years.

Q. Do you know Hart Kawaauhao?

A. I do.

Q. Do you know Henry Espinda?

A. I do.

Q. Do you know this defendant here?

A. I seen him on the night of the 20th of September.

Q. Where did you see him?

A. Down at the police station.

Q. When a man is arrested, brought into the receiving station, the police station, what are the duties of the clerk in reference to him?

Mr. THOMPSON. Object to that as being immaterial and irrelevant, as neither proving nor tending to prove any of the allegations of this indictment; if there are any duties; they are prescribed by law; if not, they are hearsay.



369 Mr. RAWLINS. It is to fix the date; we want to show the time he was arrested, the date of the arrest, that is the purpose of it.

The COURT. What date was regatta day, Mr. Thompson?

Mr. THOMPSON. Saturday, your honor.

The COURT. What day of the month was Saturday?

Mr. THOMPSON. The 21st.

The COURT. You consider it a matter of no importance to the case?

Mr. THOMPSON. Absolutely none, what day it was, as long as it was within a year and a day.

Mr. Rawlins argues.

The COURT. I don't think it is particularly important, except that it may be a matter of credibility, and I suppose that he has a right to put on testimony to prove every allegation of the indictment. Overrule the objection.

Mr. THOMPSON. I have no objection to that, but I object to the police records to do it by. Police records are not competent evidence.

The COURT. If he says they are official records, they will be competent, won't they?

Mr. THOMPSON. No, your honor. The only records competent here are those made so by United States statute. (Argues.)

The COURT. I will allow the evidence to go on to ascertain whether it is an official record.

Mr. RAWLINS (to reporter). Read the question.

(Reporter reads question, as follows:) Q. When a man is arrested, brought into the receiving station, the police station, what are the duties of the clerk in reference to him?

Mr. THOMPSON. The objection is as to what are his duties in reference to him.

The COURT (to Mr. Rawlins). Do you propose to put on any evidence to show those regulations are established by law?

Mr. RAWLINS. We propose to show that after he receives a  
370 a man in the station house he has certain memoranda and certain records which he makes. (Argues.)

Mr. THOMPSON. If it is to refresh his memory, submit it is irrelevant and immaterial.

The COURT. If it is a memorandum to refresh his memory, it is not proper unless the other side concedes it.

Mr. RAWLINS. Q. Mr. Parker, what time on the night of the 20th of September did you see this defendant?

A. 9.25 p. m. in the evening.

Q. What time?

A. 9.25.

Q. At the time he was brought to the station house, at the time he came to the station house there, was anybody with him?

A. Officer Espinda, Henry Espinda, came along.

Q. When he got into the station house where were you?

A. Behind the bars of my counter.

Q. And after he got in there what took place there?

A. Well, Henry Espinda explained the matter over to Lieutenant Hart Wawaauhau.

Q. Yes.

A. Then Hart told Espinda to take off the handcuffs from his hands, and Espinda took it off. Then Hart told him "What you want to do this dirty work for?" He said "For something," bent his head down, and he said "For something," and after that I asked him his name and he said John Wynne; I asked him a second time "What is that last name?" He spelled it out "W-y-n-n-e;" then the turnkey searched him; Koloa, the turnkey, searched him, got \$4.25, a purse, book, eyeglass, and after that the hammer was passed over to me by Lieutenant Hart as evidence.

Q. Well, now, at the time—how long was this man Wynne in there before you begun to question him about his name?

A. I couldn't tell you how long.

371 Q. Well, was it a matter of a few minutes or a matter of an hour?

A. Oh, about four or five minutes.

Q. When you asked him his name, Stephen, did he answer promptly or did it take him a long time to answer the question you put to him?

A. No; about three seconds.

Q. And then when you asked him again as to this last name, was he quick about it?

A. Oh, yes.

Q. Or did it take him a long time?

A. It took him, I think, about one second; when I asked him, he spelled it right out.

Q. From what you saw—when he was standing at the counter, in what position were you in reference to Wynne?

A. Facing to him.

Q. How close did you get to him?

A. About two feet, probably.

Q. You were on one side of the counter, he was on the other?

A. Yes.

Q. And from what you saw of him that night what can you say as to his being drunk or sober? Withdraw that. You have had experience, have you, in the police force with drunken men?

A. I have.

Q. During these five years on the police force have you been always on the receiving-station position, or what else have you been?

A. Been bicycle officer; sometimes I go as driver; sometimes acting as clerk.

Q. During these times you have acted as bicycle officer have you had occasion to arrest drunken men?

A. Yes.

Q. Seen drunken men?

A. Yes.

372 Q. Now, from what you saw of Wynne that night, what can you say as to his being drunk or sober?

A. His condition to me was sober that night.

Cross-examination by Mr. THOMPSON:

Q. Would you say he had been drinking that night?

A. I don't know, I couldn't say.

Q. You don't know anything about it, you didn't notice?

A. No.

Q. You didn't pay any particular attention to him, other than just as your duties required?

A. No.

Q. How old are you, Mr. Parker?

A. Twenty-three, going on twenty-four.

Q. You are a son of Captain Parker, of the police force, are you not?

A. I am.

Q. You have been in the police department since you were 18 years old, have you?

A. Yes.

Mr. THOMPSON. That's all.

Mr. RAWLINS. That's all.

373 W. L. WHITNEY, called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. RAWLINS:

Q. What is your full name, please?

A. William L. Whitney.

Q. And what position do you hold here in this Territory?

Mr. THOMPSON. Object to this witness being interrogated on any lines on the grounds that he was sitting within the hearing of the witnesses and in the court during the trial; the witnesses, with the exception of Mr. Whitney and Marshall Hendry, having been placed under the rule. We think that all should have been placed under the rule, that Mr. Whitney should either have acted as a witness, and been excluded, or else as assistant to the United States district attorney, and not as a witness.

The COURT. Overrule the objection.

Mr. THOMPSON. Exception to the ruling of the court.

Mr. RAWLINS. Q. How long have you been deputy attorney-general, Mr. Whitney?

A. Since the second day of September, 1907.

Q. I will ask you if you have ever seen this defendant before?

A. I have.

Q. Where was the first place that you saw him?

A. At the coroner's inquest held on the body of one McKinney.

Q. At what place?

A. In the Ewa large room of the police station, used as a dormitory sometimes.

Q. Were you present during the whole of this inquest?

A. I was.

Q. Did you have any conversation with this defendant on that occasion?

374 A. I had.

Q. What was that conversation?

Mr. THOMPSON. Object to the testimony, unless it be shown that it was free and voluntary, the conversation which he had, Mr. Whitney being a deputy attorney-general and one in authority.

Mr. RAWLINS. That is what we are showing now by this very question.

Mr. THOMPSON. Object to the conversation until it be shown that it was free and voluntary on the part of defendant.

The COURT. Objection sustained.

Mr. RAWLINS. Q. Did you make any statement or did you say anything to this defendant there on that occasion?

A. I did.

Q. What was the first thing you said to him?

A. When he came into the room I said, "Mr. Wynne, this inquest is examining into all that happened on the boat," I think I said "last night." "It is only fair to you to say that you are now held under investigation; no charge has yet been put upon you in regard to these events, but one may be, and anything that you say here may be used against you in any trial. Understanding that, do you want to make any statement?"

Q. What did Wynne say?

A. He said he didn't know whether it would be advisable for him to make a statement.

Q. What next happened?

A. I asked him again, "Well, Mr. Wynne, do you want to make a statement?" to which he answered that he did.

Q. Well, what next happened, then, Mr. Whitney, after you made this statement to him in regard to making a statement or not and he said that he would make a statement?

A. I then said, "Well, what happened?"

375 Q. Was there any promise held out to him on that occasion?

A. There was not.

Q. Any threats made by you?

A. No.

Q. Was he put under oath?

A. He was not.

Q. Any inducements held out to him for making that statement?

A. There was not.

Q. Any intimidation?

A. There was not.

Mr. RAWLINS (to Mr. Thompson). You may cross-examine as to this.

Mr. THOMPSON. Q. Were you there when he was brought in?

A. I was.

Q. Who was there at the time?

A. The coroner's inquest, I don't remember the men; Mr. Jarrett was acting as coroner, and I only remember one man, that is a man with gray hair and short whiskers, gray whiskers; I know him by sight; I don't know his name. Mr. Breckons was there. If I remember correctly, Mr. Hatch, the clerk of this court, was with Breckons, sitting in the back of the room. There were several witnesses standing in the little hallway that leads downstairs in the back stairs, and the captain, Holmes, had testified and was in the room.

Q. Had the captain testified in the presence of Wynne?

A. No.

Q. Do you know the names of the coroner's inquest—the jurors?

A. I do not.

Q. Was one of them McDonald?

A. I believe that is the name of the white-haired whiskered gentleman.

Q. Was another one Friel?

A. I don't know him.

(Mr. Thompson requests the bailiff to call Mr. Friel to the door.)

376 Mr. THOMPSON (pointing to gentleman in doorway). Q. This is the gentleman I refer to.

A. Oh, his name is Friel.

Q. Was Dan Vida one of them?

A. Yes.

Q. You know Dan Vida?

A. I know Dan Vida.

(Mr. Thompson asks bailiff to call Mr. McDonald to the doorway, but bailiff reports that he is not to be found. Mr. Rawlins then stated that he would have Mr. McDonald here in the afternoon, and Mr. Thompson asked leave to identify him at that time, to which Mr. Rawlins stated there would be no objection.)

Mr. THOMPSON. Q. He was the bailiff of the United States grand jury here; Mr. McDonald was the bailiff of the grand jury, he has a Van Dyck beard, I think, used to work for Castle & Cooke years ago?

A. I don't believe I know him by name.

Q. Do you know David Kaahanui?

A. I don't believe I do.

(Mr. Thompson has bailiff call David Kaahanui to the doorway.)

Q. Was he one of the members of the coroner's inquest?

A. I don't remember.

Q. They were all there when you got there, were they?

A. Yes; the jury had not yet convened, but I presume they were all scattered around when I got there.

Q. Did you represent the Territory?

A. I presume I did; I was requested by Jarrett to examine the witnesses.

Q. Then you examined the witnesses at Jarrett's request?

A. All the witnesses.

Q. Did Jarrett make any statement to the defendant, do you know?

A. He did not.

Q. Not while you were there?

377 A. Not while I was there; I was there during all the time.

Q. Were you there when the defendant came in?

A. I was.

Q. Now you say the first thing you made this statement to him, telling him there was an investigation?

A. No; that he was arrested for investigation.

Q. That this was an investigation as to all that occurred on the boat?

A. Yes.

Q. Did you tell him that McKinnon was alive or dead?

A. No, I did not.

Q. Did he ask you?

A. No.

Q. At any time?

A. After the inquest was over, and I had gone downstairs and was standing at the clerk's room, the receiving clerk's desk, Mr. Wynne came downstairs there with an officer, I don't remember who, and said "I would like to ask you one question." I said "Go ahead." He said "Is McKinnon dead yet?"

Q. That was after the inquest?

A. After the inquest; yes, sir.

Q. He didn't ask you at any time prior to that?

A. He did not; I had never seen him prior to that.

Q. But you saw him at the time of the inquest upstairs?

A. Yes.

Q. And when you started in and told him this investigation was of matters that occurred, he didn't then ask if Wynne was dead?

A. He did not.

Q. Did you ask him any question, or did any of the jurors ask him any question, that you remember?

A. I asked him questions.

Q. Did any of the jurors ask him any questions?

378 A. I think not; the best of my recollection is they did not.

Q. You just interrogated him, did you?

A. I did.

Q. What did you say to him when he started to talk, before he started to talk? How did you get him going on the subject?

A. I said, "Well, what happened?"

Q. You said, "Well, what happened?"

A. Yes.

Q. How did he appear that morning, Mr. Whitney?

A. Just as he does now.

Q. How was he dressed?

A. This was not in the morning I saw him; it was in the evening.

Q. In the evening?

A. Yes.

Q. About what time?

A. As I remember it, it was in the afternoon.

Q. About half-past five, wasn't it?

A. I couldn't say the exact time; I should think it was about that time.

Q. How was he dressed?

A. I don't remember.

Q. Did he have a cap or a hat on, anything of that kind, when you saw him?

A. Not when he was in the room.

Q. Did he appear to be at ease and comfortable when you first spoke to him or otherwise?

A. He appeared to be at ease when I first spoke to him.

Q. You have had some experience, I mean impersonal experience, with drunken men, have you?

A. Oh, yes; a lot of it.

Q. You were for a long time district magistrate of Honolulu?

379 A. I was.

Q. When you saw Mr. Wynne on that evening, which was the day after—

A. As I remember it was the day after.

Q. It was on the 21st, was it not?

A. I don't know the date, except as I have heard it testified here.

Q. Do you remember whether it was regatta day or not?

A. I don't remember that.

Q. When you saw him at that time did you pay any particular attention to him, to whether or not there were any of the usual signs of drunkenness?

A. I think I did.

Q. What was your judgment of it at the time?

A. Before I got through with the case I noticed, after he had detailed the circumstances, more or less—I noticed that he was more or less excited, as a man is after indulgence in drink; I laid it to that.

Q. It looked like the morning after to you, didn't it?

A. It did before I got through with the case.

Q. Before you got through it looked like he was suffering from the effects of a jag the day before?

A. Yes.

Q. And what is your judgment, gathered from a rather wide experience from seeing them in the district court the morning after?

A. Yes; that is the only experience I have had, in that case.

Mr. THOMPSON (to Mr. Rawlins). Let the witness testify.

Mr. RAWLINS. Move to strike out this last testimony as incompetent and irrelevant and not proper cross-examination at this time. Counsel wished to qualify him relative to the condition of the man when he made the statement.

The COURT. I will allow the motion as to the last sentence—



Mr. THOMPSON. No objection to that.

380 The COURT. All testimony regarding the signs of drunkenness, after the answer "I think I did," may be stricken out.

Mr. THOMPSON. To the action of the court in granting the motion to strike, we respectfully except.

Mr. THOMPSON. Q. What did you notice in regard to his condition at that time?

Mr. RAWLINS. Objected to as incompetent, irrelevant, and immaterial, improper cross-examination, and based on what the court has already ruled on.

The COURT [to Mr. Thompson]. You were to cross-examine him in regard to the voluntariness of his testimony and of the influences surrounding it, as to a warning that it might be used against him, and as to whether there were any inducements or promises or threats made. Now, has the matter of his condition anything to do with it? If you had asked him if he was in a state of intoxication I would allow it, but a man who simply was intoxicated the day before, his senses are usually very normal and acute, except that he is nervously affected.

Mr. THOMPSON. Now, the theory on which I ask to introduce this testimony is, first, that it must be shown that the statements made were voluntary——

The COURT. I have already said that if you wish to show he was intoxicated——

Mr. Thompson argues.

The COURT. I think you are right on that; that is a matter which should stay on the record, as showing on what basis the court allowed the testimony.

Mr. RAWLINS. Then your honor withdraws the ruling already made?

The COURT. Yes; I withdraw the ruling.

Mr. RAWLINS. Your honor has ruled that all this testimony was incompetent, and instructed the jury to disregard it; now your honor holds it was proper?

381 The COURT. It was not testimony for the jury, it was testimony for the court, to enable it to decide whether Mr. Whitney might testify as to what this defendant has said.

Mr. RAWLINS. Then I ask your honor to instruct the jury that they have absolutely nothing to do with it; it was a question of law for your honor. [Argues.]

The COURT. It often happens, gentlemen of the jury, that the question of the qualifications of a witness to testify comes up. Sometimes an expert is offered, to testify as to expert experience, and it is customary in this court when this is done and the counsel produces such a witness and a witness has shown he was an expert by the examination, to allow the other side to immediately cross-examine that testimony as to his qualifications as an expert. In this case it is as to the qualifications, to the right of the prosecution to introduce Mr. Whitney's testimony as to what defendant said, and it being

a question as to whether it was admissible, the other side was allowed to cross-examine him on that point, and the jury needn't bother themselves about that.

Mr. RAWLINS. I understand your honor's ruling to be that the statements made by Wynne were voluntary and competent at that time, and the witness is to be allowed to testify on that point?

Mr. THOMPSON. There has been no such ruling yet.

The COURT. I suppose it is both ways; sometimes the ruling is made at once. Before you may proceed on your theory—

Mr. Rawlins argues.

The COURT. I will allow the examination to go on.

By Mr. THOMPSON. Q. What did Mr. Wynne say, Mr. Whitney?

A. The examination was, perhaps, fifteen minutes long, and I could not possibly detail the whole examination. He started out, as I remember it, with a statement that he did not know why he had done it; that he must have been drunk. That he had been drinking that day; that he drank that morning at a saloon known as the

"Two for One" saloon.

382 The COURT. Q. You mean the morning of the day before?

A. Day before, yes; on the day of the happening of the event. That he had drunk two or three beers that morning. That in the afternoon he had drunk at several saloons, and that he had not kept count of the number of drinks he had taken. That the third engineer, that the deceased and the first engineer, or the first assistant engineer, I think he said, both had it in for him, and that they had tried to fire him off the boat at the trip before, and that they had not succeeded in firing him off the boat. That he did not know where he got the hammer, and that he knew that he had a grievance against the deceased, but didn't know how he came to kill him. That, in substance, is the statement that I remember.

Mr. RAWLINS. Q. This statement, was it made with hesitation or reservation?

A. It was made freely, in answer to the question.

Mr. THOMPSON. Move that it be stricken out, as not responsive.

Mr. RAWLINS. Submit it is responsive. [Argues.]

The COURT. I will allow the motion.

Mr. RAWLINS. Q. Answer the question, Mr. Whitney, was it with reserve or hesitation?

A. No.

Q. From the manner of defendant at that time, did he understand it—did it appear to you that he understood what you were saying; what was going on there?

A. It did.

Q. What is this that you have testified to here, in reference to a grievance with the third assistant engineer?

A. I remember that statement very clearly, "I knew I had a grievance, but don't know why I did it," as, I believe, the final statement, from which I ceased asking him the questions. What that grievance was can only be told by the other testimony.

The COURT. His answer was, he didn't know "why" he did it, not "how?"

383 A. No, "why."

Cross-examination by Mr. THOMPSON:

Q. Mr. Whitney, you are deputy attorney-general of the Territory of Hawaii, are you not?

A. I am.

Q. And have been seen since September 2nd, 1907?

A. Yes; I believe that is the date.

Q. You were acting in your official capacity on the 20th of September, or on the date of the examination which you have testified to, probably the 21st?

A. I presume so; I was asked by Mr. Jarrett, as a deputy attorney-general, to ask the questions.

Q. And I am going to ask you to detail again in regard to the appearance of Mr. Wynne at the time of that examination.

Mr. RAWLINS. Objected to as improper cross-examination, as it has been gone into on the qualifications as to whether this statement of his was right.

The COURT. Overrule the objection.

A. He appeared as he came into the court room about as he does now; there was nothing unusual in his appearance. After the examination or the statements had proceeded to a finish I noticed that he was excited.

Q. Now, will you describe his excitement, and as district magistrate you have had considerable chance to observe and have observed the after effects of a drunk, have you not?

A. A good deal over a thousand cases, I think.

Q. State whether or not, in your judgment, the attitude of Mr. Wynne, when you noticed that he was excited, was a nervous condition following as an aftermath of a drunk.

A. I couldn't say, of course, that it was such; but it was such as appeared in those cases.

Q. And in your judgment, taken from the cases, I will ask you to answer the question.

384 A. I couldn't say; I was in doubt even at that time whether it was the outcome of drink or whether it was the natural outcome of the detailing of the events of an awful tragedy.

Q. Your judgment is what we want on the subject, Mr. Whitney. You testified before, in answer to a question as to qualification, that it had all the appearances and you believed that it was, I think?

A. I don't remember testifying to that, but if I had seen it in an ordinary case I would have said that it is the aftereffects of drinking.

Q. Was there any record made of this coroner's inquest?

A. There was.

Q. A statutory record, or some record outside of that?

A. I presume there was a statutory record, though I never saw it.

Q. Was there any other record made?

A. There was.

Q. At your request?

A. No.

Q. Is it in your possession, custody, or control?

A. No.

Q. Who has it?

A. Mr. Rawlins has one copy.

A. Who has the other copy?

A. I don't know.

Q. Do you know whether or not Jarrett has another copy?

A. I don't know.

Mr. THOMPSON (to Mr. Rawlins). Will you produce the copy?

Mr. RAWLINS. This is the original. [Hands document to Mr. Thompson.]

Mr. THOMPSON. Q. You didn't pay very much attention to anything, except the examination there, Mr. Whitney, did you?

A. No.

Q. I notice—do you remember any of the witnesses who testified?

385 A. I remember Captain Holmes, Doctor McDonald, and a man called Wirshuleit, or something, a Pole or a Russian of some sort.

Q. Wierschmidt?

A. I don't know; Wirshuleit, something like that.

Q. Do you know Louis Aylett?

A. I do.

Q. Was he on the coroner's jury?

A. I think he was.

Q. Do you know Otto Schilling?

A. Schilling; is that the automobile man?

Q. No; that is Schoening.

A. I don't believe I know him.

Redirect examination.

Mr. RAWLINS. Q. Now, Mr. Whitney, you were asked here relative to the appearance of Wynne after he had started to make this statement; your answer was you were in doubt as to whether it was the result of taking liquor the night before or the result of the detailing of the events of an awful tragedy. Now, will you explain further what you meant by that answer?

A. I meant that any man who was a witness or who has been in a case where a person has been killed by violence, in detailing those accounts, in detailing an account of the tragedy, naturally becomes nervous.

Q. And from what you saw of Wynne at that time, his state, you couldn't tell whether it was from the effects of drink or from the detailing of these awful events?

A. I couldn't tell; no.

Q. You say he was nervous; when he first went in there you say he was about the same as he appears here in court?

A. Yes.

Q. When did this nervousness appear; how long after he had started to talk?

A. I couldn't say. I noticed it towards the close of the testimony.

386 Q. And up to that time, so far as you were concerned, he appeared to be in the same state as he is in now?

A. When he started in he certainly appeared to be in the same state as now.

Q. Cool and collected on that occasion?

A. Yes.

Q. And when he appeared before the body of men there did he appear nervous at the beginning, when he was first brought in there?

Mr. THOMPSON. Objected to as improper redirect, and as already having been asked and answered on direct examination and cross-examination.

Mr. Rawlins argues.

Mr. THOMPSON. Withdraw the objection.

A. He did not.

Mr. RAWLINS. Q. When you went downstairs and Wynne approached you in reference to asking if the man McKinnon was dead or not, what was his appearance on that occasion?

Mr. THOMPSON. Objected to as improper cross-examination. That was brought out on the examination as to the qualifications of Mr. Whitney, and was not touched afterwards.

The COURT (to Mr. Rawlins). I don't think you can lead the witness in matters of that kind.

Mr. RAWLINS. Q. After he had made these statements in the presence of the coroner's jury, did you have occasion, during the same day, to see him again?

A. Yes; downstairs.

Q. How long an interval intervened between the time Mr. Wynne had made these statements in the coroner's jury and the time you again saw him?

A. It was but a few minutes. I retired while the jury was considering their verdict, and went downstairs, and Wynne came down shortly after I did.

387 Q. Now, what was his condition at that time?

Mr. THOMPSON. Objected to on the ground that it is immaterial and improper redirect. There was nothing brought out in regard to this on cross-examination.

The COURT. I think the incident followed the inquest so closely that it is within the propriety of redirect.

(Here a recess was taken until 2 p. m.)

AFTERNOON SESSION.

W. L. WHITNEY (redirect examination, cont'd).

Mr. RAWLINS. I will ask the stenographer to read the last question. (Question read.)

A. He appeared normal.

Q. Was he still excited, or had he regained his composure?

Mr. THOMPSON. Object to it as extremely leading and improper redirect.

The Court. Overrule the objection.

A. He did not appear excited.

Q. How long a period of time was this after he had related the story referred to by you?

Mr. THOMPSON. Objected to, as already asked and answered.

The Court. Sustain the objection.

Recross-examination by Mr. THOMPSON:

Q. Mr. Whitney, you say he appeared to be normal. Had you ever seen him before that occasion?

A. No; that is why I answered that way.

Q. Then you know nothing about how he appeared when normal.

A. He appeared as a normal man.

Q. You had never seen him before?

A. Not that I know of.

Q. He then appeared at that time as when you first saw him?

A. Yes.

388 Q. You said in answer to a question of Mr. Rawlins, to explain what you mean by his nervousness, that you didn't know whether to attribute it to drink, although that was your first impression, or the result of the relating of the details of a horrible tragedy, or words to that effect; am I right?

A. Yes.

Mr. RAWLINS. Objected to as improper cross-examination and move to strike out the answer. Object to the question on the ground that it is improper recross-examination.

The Court. Overrule the objection.

Mr. THOMPSON. Q. Your answer was "Yes," Mr. Whitney?

A. Yes.

Q. Were there any details recited by Mr. Wynne other than those which you have just given?

A. No.

Q. Then he didn't recite any details in regard to the tragedy, did he?

A. He told the main events, that is all.

Q. But the main events, just as you have recited them?

A. It would cover a great deal more than I have recited, because I couldn't remember it all, but I have tried, in substance, to testify to all that he said.

Q. Then when you use the expression, "It may have been because of relating the details of a horrible tragedy," or something of that kind, you were a little implicitous in the word "details?"

A. Yes.

Q. And what he did recite was what you have subsequently recited to this jury?

A. In substance.

Q. Have you seen many people reciting in the manner that he did during your time?

389 Mr. RAWLINS. Objected to as improper recross-examination.

The COURT (to Mr. Thompson). Of course you had a chance to ask that question on your cross-examination.

Mr. THOMPSON. Then I ask, as a matter of discretion, that I be permitted to ask it now?

The COURT. Very well.

(Question repeated.)

A. Of course every case differs from every other case, but I have seen a good many confessions made.

Q. Have you ever seen anybody before a coroner's jury under like circumstances, or similar circumstances, to this one?

A. I have heard two others that I recollect now before a coroner's jury.

Q. In homicide cases?

A. In homicide cases.

Q. Were the actions of this defendant anything like the actions of those that you had seen before?

A. Yes.

Q. They were?

A. They were.

Q. Then what made you think that he was drunk rather than sober, or had been drunk, rather than sober?

A. Of course those are more common; I am not a physician or surgeon. All I noticed is that his nerves were unstrung and that his general appearance was the appearance of a man whose nerves had gone back on him. Now, to be fair, the commoner method by which that is accomplished is by use of intoxicating liquors, and that shows the day after; however, I have seen them in cases where persons are making a statement, if not detailing, the account of a tragedy in which they themselves have been concerned.

Q. That, however, didn't suggest itself to you excepting as a secondary consideration, did it?

390 A. I say I was in doubt at that time which was the cause.

Q. What was your first impression on the subject?

Mr. RAWLINS. Objected to as already asked and answered.

The COURT. Overrule the objection.

Mr. RAWLINS. Object to it on the ground that we are not entitled to have his impression. (Argues.)

The COURT. Overruled.

A. I couldn't say which was the first in point of time of my impressions; I was looking at the man, looking at him very carefully, it being—

Q. Well, in point of importance, then?

A. I couldn't say.

Mr. THOMPSON. That's all.



By a JUROR (Mr. Lucas). Q. Mr. Whitney, do I understand you to say that you have impressions, or you understand what a man's feelings are after he has been on a bat the night before?

A. I don't know what his feelings are; I know what the outside signs are.

Q. You don't know anything from actual experience?

A. I have never been drunk, sir, no; that part of my education has perhaps been neglected.

Mr. RAWLINS. That's all.

391 L. B. REEVES, called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. RAWLINS:

Q. What is your full name, please?

A. Louis B. Reeves.

Q. During the month of September, 1907, what was your occupation?

A. Harbor police of Honolulu.

Q. I will ask you if you know this defendant here, Wynne?

A. I do.

Q. Do you know a man by the name of Bright?

A. I do.

Q. Do you know a man by the name of Frank Coker, commonly known as "Jerry?"

A. I do.

Q. Do you know a man by the name of Guy Livingstone?

A. I do.

Q. Do you remember the occasion of this trouble aboard the steamship "Rosecrans?"

A. I do.

Q. The early part of that evening, Mr. Reeves, I will ask you where you were?

A. I was in the Royal Annex cafe, at the corner of Merchant and Nuuanu streets.

Q. What time was it when you went in there?

A. I don't remember the exact time, but to the best of my recollection it was about seven o'clock.

Q. Did you see this defendant in there at that time?

A. I did not.

Q. Did you see him in that place that evening?

A. I did.

392 Q. What time did you see him there?

A. About eight o'clock.

Q. Were you with anybody in there?

A. I was sitting at a table with Guy Livingstone and Bright.

Q. And I will ask you if this defendant came in there by himself, or was he in company with somebody?

A. In company with three or four other men.

Q. In reference to the place where you were seated, where did he take a seat?

A. He sat at a table nearer the door from where I was; on the makai side of the room.

Q. How close was he to you?

A. About fifteen feet, I should judge.

Q. How long was he in that place?

A. I wouldn't say, but I think about half an hour.

Q. Did he leave first or did you leave first?

A. He left before I did.

Q. During the time that he was in there was there any trouble?

A. He had some words with Mr. Bright; just the exact words I don't remember, but it had some regard to some matters aboard the ship, which I didn't pay any particular attention to at that time, and I stopped the affair by telling Bright that the police station was across the street and he would get arrested if he started a rough house.

Q. How long after this conversation had occurred between Bright and the defendant did the defendant leave?

A. Not more than a few minutes; I don't know just how long.

Q. Did you have occasion to observe the defendant at the time you were in Scotty's that night?

A. Only when my attention was called to him by this altercation between he and Bright.

Q. Did you see him when he went out of the place?

393 A. I did.

Q. And during the time this altercation was on, as you call it, did you have opportunity to observe him?

A. I did.

Q. I will ask you if you have ever had any experience with intoxicated persons?

A. I have; considerable, yes, sir.

Q. How long were you on the police force?

A. Eighteen months.

Q. I will ask you, from your observation of Wynne on the night you have testified to, what you can say as to his sobriety?

A. I should never have arrested him for being drunk; he had the appearance of a man who had been drinking, but not to any great excess that I could see.

Q. From what you observed of him, what can you say as to whether he was drunk or sober?

A. I should say he was not drunk.

Q. Did you see him take any liquor when he was in that place?

A. I recollect that they were drinking beer; whether he drank any at that particular time or not I don't remember.

Q. Now, after he went out of that place when did you next see him?

A. I saw him the following morning, about nine o'clock.

Q. Where was he then?

A. He was in the jail yard at the police station.

Q. Did you have any talk with him on that occasion?

A. I did not.

Q. Just casually saw him as you passed?

A. Yes, sir.

Q. Did you see him after that?

A. I saw him that same night.

Q. Where?

A. At the coroner's inquest, which was held at the police station.

394 Q. Who was present at that time, Mr. Reeves?

A. Well, the deputy sheriff, Mr. Jarrett, Judge Whitney, C. H. McBride, I believe, although I am not sure, the coroner's jury, and myself.

Q. Did you see Wynne there before the coroner's jury?

A. I did.

Q. Were you in a position where you could observe him on that night?

A. I was.

Q. What can you say as to his bearing on that occasion?

A. Well, he looked to me like a man who was very much worried; something on his mind.

Q. Were you there until after the coroner's jury was over?

A. I was.

Q. Did you see Wynne after that?

A. I did.

Q. Where?

A. I saw him when he was brought to the judiciary building from the police station.

Q. Who brought him here?

A. The United States marshal.

Q. What time was it when he was brought here?

A. About ten o'clock that evening.

Q. Day or night?

A. Night time, that evening.

Q. Now, how was he brought up here, Mr. Reeves?

A. Brought up in the patrol wagon.

Q. Who was in the patrol wagon at that time?

A. Wynne, Mr. Breckons, the marshal, and myself; maybe Commissioner Hatch was; I don't recollect just exactly whether he was or not.

Q. After you got here what was done?

395 A. The marshal read the warrant to Wynne, and he was committed to jail by Commissioner Hatch at that particular time.

Q. Well, at the time that the warrant was read, and during these proceedings of commitment, was anything said by the defendant?

A. He asked a question of some of us—no; he made the statement that the man was dead then, or words to that effect, that he knew or realized that the man was dead.

Q. Now did you, after that night when he was committed, did you see him again?

A. I did.

Q. When was that?

A. The following morning at about nine o'clock.

Q. Where?

A. In Breckons' office.

Q. Who was present on that occasion?

A. The marshal and Breckons.

Q. Anybody else?

A. Myself.

Q. Was the defendant there?

A. The defendant; that is where I saw him.

Q. What was said on that occasion by Mr. Breckons, if anything, to this defendant, that Sunday morning?

A. To the best of my recollection Breckons asked him if he had anything to say in regard to the occurrence on board the "Rosecrans" on the night of the 20th of September, or words to that effect, and he also told the defendant that he need not answer any question unless he wanted to, that anything he might say would naturally be used against him in his trial.

Q. Was there any inducements held out by Mr. Breckons for him to talk?

A. Not at all.

Q. Did you hear any threats made, either by Mr. Breckons or by the marshal or yourself?

396 A. Not at all.

Q. Was there any urging that it would be better for him to make a statement?

A. No, sir.

Q. After Mr. Breckons had made this statement to the defendant that you have related here, what did the defendant say; did he say anything directly in response to that statement made?

A. Why, he answered it, but just the words he used I don't remember; he expressed a willingness at that time to answer any question that he might be asked.

Q. Was anything else said to him by Mr. Breckons or Mr. Hendry or yourself?

A. Well, he was asked several questions regarding that particular night, in endeavoring to obtain a motive.

Q. Well, before he started—in connection with this statement that Mr. Breckons had made to him that he need not answer the questions because what he might say might be used against him, was anything else, anything further, said in regard to that, Mr. Breckons?

A. Not that I remember of.

Mr. Thompson here asked to be allowed to cross-examine in this regard, which was allowed.

By Mr. THOMPSON. Q. At that time were you working for the United States Government?

A. No, sir.

Q. Who were you working for, the territorial government?

A. Yes, sir.

Q. And when you brought him up here did you bring him in the patrol wagon?

A. Yes, sir.

Q. This was in the morning, you say?

A. At night.

397 Q. What time at night?

A. About ten o'clock.

Q. That was ten o'clock, after the coroner's inquest, was it?

A. Yes, sir.

Q. Was he handcuffed?

A. No, sir.

Q. He was taken into Mr. Breckons' room, was he?

A. No, sir.

Q. Where?

A. Taken into the marshal's office.

Q. Behind the little bars there?

A. To the best of my recollection it was behind those.

Q. Was it in the little room there or the large room?

A. In the office.

Q. Was anyone with Wynne at all?

A. Well, the only persons present were Hatch, the marshal, Breckons, and myself, that I remember.

Q. He wasn't represented in any way, was he?

A. No, sir.

Q. He was alone?

A. Yes, sir.

Q. Did you come up with him, along in the patrol wagon?

A. Yes, sir.

Q. Breckons came up in the patrol wagon?

A. Yes, sir.

Q. Hatch?

A. I don't remember about Hatch.

Q. The marshal?

A. The marshal.

Q. You don't remember what Mr. Breckons said to him, except that he said, "Now you don't have to make any statement if you don't want to?"

398 Mr. RAWLINS. Object to that, as there was nothing said that night; but the next day, Sunday morning, this statement was made.

Mr. THOMPSON. This question is not directed to Saturday night, if counsel listens to the question. I said "When this statement was made to him," and so on.

The WITNESS. A. Mr. Breckons said nothing to him except—that is, the first thing Breckons said to him was he didn't need to make a statement if he didn't want to; if he did it would naturally be used

against him at the trial. To the best of my recollection that is all that was said.

Q. And Wynne made some remark showing his willingness?

A. Yes, sir.

Q. Did he express a willingness to talk?

A. He did.

Q. Said he wanted to talk?

A. I don't know that he said he wanted to talk, but in some manner he said he wanted to talk; just the exact way I don't remember.

Mr. Rawlins here resumed his direct examination, as follows:

By Mr. RAWLINS. Q. What did he say at that time—after he started to talk?

A. He was asked by Mr. Breckons if he remembered where he was on Friday night, and he said "Yes," he remembered two or three places he had been in, and he also at that time remembered going into Scotty's with these two or three men I have mentioned, and he mentioned the names of one or two of them. Mr. Breckons, in endeavoring to find the motive, asked him—

Mr. THOMPSON. Object to the witness testifying what Mr. Breckons' ideas were. Ask it be stricken out.

Mr. RAWLINS. We agree to that.

Q. We want you to tell what Mr. Breckons said to him, and what this defendant said—the conversation. Now, what did this defendant say, and what did Breckons say on that occasion, so far as you can remember?

399 A. Well, there was quite considerable said, but the main facts impressed upon my mind at that time were Mr. Breckons' questioning him in regard to the motive—the exact words—

Mr. THOMPSON. Move that be stricken out.

The COURT. State, if you can remember, the question Mr. Breckons asked him.

Mr. RAWLINS. Q. Can you remember the first thing that Mr. Breckons said to him after he had warned him about making a statement?

A. I don't remember the words.

The COURT. Q. Then give the substance of it?

A. I can't do that either.

Mr. RAWLINS. Q. Tell us, in your own way, as much as you can remember as to what Wynne said in that room on that occasion?

A. Well, he said that he remembered going into Scotty's with these three or four men, and he mentioned the name of two of them—McDonald and Nixon—and he said that he didn't remember anything after leaving there to go away from Scotty's.

Q. Yes.

A. He said that there had been some difficulties between himself and McKinnon in San Francisco on the previous trip; that McKinnon had tried to get him out of the ship, but that he had stayed there regardless; that the trouble he had with Bright in Scotty's that Friday night was what put it into his mind that McKinnon was try-

ing to knock him with Bright. Bright was first assistant engineer. He said he didn't remember where he got the hammer from; he had tried to think all the previous night where he had got it from. The rest of it I don't remember much about; that was particularly impressed upon my mind, though.

Q. Was anything said to him as to his whereabouts after he left the saloon that night?

A. I don't recollect anything being said.

400 Q. Do you recollect anything else at this time that occurred in Mr. Breckons' office?

A. I do not.

Cross-examination by Mr. THOMPSON:

Q. When they read the warrant to him, Reeves, where was that—in the marshal's office?

A. Yes, sir.

Q. And he then, when they read the warrant to him, said: "The man is dead, then?"

A. Words to that effect; yes, sir.

Q. That was all he said on the subject, was it?

A. That is all I recollect, at that time.

Q. Was that said in an inquiring tone; do you remember how he said it?

A. Well, it was a tone of finality—that he realized that the man was dead at that time.

Q. When you were in the Criterion, was it, you say he came in about seven o'clock?

A. In the Royal Annex.

Q. In the Royal Annex?

A. Yes, sir.

Q. About seven o'clock?

A. Yes, sir.

Q. And you stayed there right along with the crowd until they left?

A. No, sir. I had dinner before I went into the bar, and it was possibly quarter to eight when I went in the bar.

Q. I see; you got there at quarter to eight, and stayed there until about what time?

A. Possibly half past eight or twenty minutes to nine.

Q. And during all the time that you were there you were with Bright and Livingstone, were you?

401 A. Not the entire time; the time I was at the bar I was with Bright and Livingstone.

Q. During all the time you were in the saloon you were with them?

A. Yes, sir.

Q. You were not in the party that Wynne was in?

A. I was not.

Q. How did this altercation arise; who started it?



A. To the best of my recollection Wynne started it by talking loud. Whether Wynne was the man that started the loud talk or not, I don't remember.

Q. There was some loud talk that started the altercation?

A. Started Bright going to this table—went over where they were.

Q. Bright started to the table where Wynne and the rest were?

A. Yes, sir.

Q. Did he single out Wynne?

A. Yes, sir.

Q. And the thing quieted down, did it?

A. Yes, sir.

Q. Was Bright drunk or sober?

A. Well, he had been drinking, but I wouldn't call him drunk; he knew what he was talking about with me.

Q. How many drinks did you see Bright have, any?

A. He had two high balls while I was there with him.

Q. Was Bright drunker than the rest of the crowd, or were they all about alike?

A. Well, Livingstone, I don't think—

Q. I don't mean your crowd; I mean the other fellow's crowd?

A. No; I don't think he was.

Q. They were all about the same, were they?

A. No; I wouldn't say that, because the condition of the other men I didn't pay attention to, except they could walk out, and apparently knew how to pay for the drinks.

Q. Didn't pay any attention to that at all, any particular  
402 attention?

A. I remember only when Bright singled out Wynne; naturally my attention was centered on him for a few minutes while the trouble was going on.

Q. As between Wynne and Bright, what about their respective conditions?

A. Well, to the best of my recollection I don't see that there was much difference in their condition.

Q. Now, you have —, you were working for the police department for about a year prior to that time, were you not?

A. Yes, sir, not quite a year; I went there in January.

Q. Do you know Joe McKinnon?

A. I do.

Q. Worked in the police department with Joe?

A. No, sir.

Q. You succeeded him, went in with the Iaukea administration?

A. Yes.

Mr. THOMPSON. That's all.

By a JUROR (Mr. Lucas). Q. How many drinks did you have that night?

A. At that time I wasn't drinking.

Q. Then what was your business in there?

A. I went in to dinner, and stopped to talk with Guy Livingstone on the way out.

Q. Why didn't you arrest these men when you saw them drunk there?

A. They were not drunk, in my opinion.

Q. What do you call a drunken man?

A. One who is incapable of taking care of himself.

Q. If a man is full of booze and he can navigate you leave him alone?

A. If he can navigate he is all right.

Q. It doesn't depend on the nationality of a man, then, whether the police arrest him or not?

403 A. No, sir.

Q. If it was a native who came out full of booze, or a common, ordinary sailor, you would arrest him?

A. No, sir.

Q. Don't you make a difference between an officer and a sailor?

A. I do not.

Q. Is that not a general custom among policemen?

A. I wouldn't say as to that; it is not my custom; the other police have to look out for themselves.

Q. They discriminate, don't they, as to who they will pull in and who they won't?

A. No, sir; to the best of my knowledge they do not.

Mr. LUCAS. That's all.

Mr RAWLINS. That's all.

404 WILLIAM P. JARRETT, called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. RAWLINS:

Q. Mr. Jarrett, what official position do you now hold in the county of Oahu?

A. Deputy sheriff, Honolulu.

Q. And were you such during the month of September, 1907?

A. I was.

Q. During that month did you have occasion to hold an inquest over the body of a man by the name of Archibald F. McKinnon?

A. I did.

Q. Where did you first see that body?

A. Up at the hospital morgue—Queen's Hospital.

Q. And when was it, do you remember?

A. It was the night of the 20th—Friday night.

Q. And how late was it when you saw it?

A. Oh, about somewheres around ten o'clock that night.

Q. After you had seen the body at the morgue do you know what was done with it?

A. That night?

Q. Yes.

A. Well, I locked the door and took the key down to the police station that night.

Q. Yes.

A. And next morning I got a jury together and went up and viewed the body at the morgue at the Queen's Hospital, somewhere around seven o'clock, I think; I couldn't say what time.

Q. Now, at the time that you saw the body on the night before, and when you saw it the next morning, what can you say as to the condition?

405 A. There was nobody could get into that morgue there outside of myself; I had the key.

Q. Now, after the jury had viewed the remains, Mr. Jarrett, of the body, what was done with it, if you know?

A. It was sent to the board of health morgue here.

Q. Did you see it here at the board of health?

A. Yes.

Q. Were you there at the morgue here—the board of health morgue—when the body arrived?

A. No.

Q. When did you first see this defendant, Wynne, after the night of the 20th—after the night of the 20th that you have testified to?

A. To the best of my recollection, I think it was the night of the inquest.

Q. Now, going back to the night when you saw this body in the morgue, did you see wounds on the body?

A. Yes.

Q. Can you tell us about those, so far as you remember?

A. So far as I could remember, I saw a gash in the head here [showing]; that is all I looked at; and the doctors at the hospital said he was dead—

Mr. THOMPSON. Object to what they said.

Mr. RAWLINS. Q. At the time you put him into the morgue was he living or dead?

A. He was dead.

Q. Now, at the inquest, you say you saw this defendant, Wynne?

A. Yes.

Q. When was that inquest held?

A. Held on the Saturday night, on the 21st of September.

Q. 21st of September?

A. Yes, sir.

406 Q. And who acted as coroner on that occasion?

A. I was the coroner, and I had Whitney, deputy attorney-general, to assist me. He done the questioning.

Q. Now, state whether or not Wynne appeared before that coroner's jury?

A. Yes; he did.

Q. And was he sworn there?

A. I don't think he was.

Q. Was any statement made at that time by Wynne?

A. Yes.

Q. Do you recollect at this time anything that he said on that occasion, Mr. Jarrett?

A. Well, the first thing Whitney told him that whatever statements he made there might be used against him.

Q. Yes?

A. That was the first thing Whitney told him, and if there was any statements he wanted to make he had to make it freely of his own free will, and he made a few statements there.

Q. Can you tell us what he said there on that occasion?

A. Well, when he was asked if he struck McKinnon he said, "I did; I did it;" but he said a lot of other things I can't just remember now.

Q. Well, tell us as much as you can remember, Mr. Jarrett; tell us as much as you can remember of what took place there.

A. Mr. Whitney asked him about how many drinks he had taken that day, and he said he had taken quite a lot.

Q. Yes.

A. He said something about coming ashore first thing, as soon as he landed here, and going back to work again for a couple of hours. He said he came ashore as soon as the boat got in, and then went back and had to work up to 12 o'clock. By that time he had a few drinks and then came ashore again and went to a number of saloons in town:

he didn't just know the names. He was asked for the names  
407 of the saloons, and said he didn't know the names.

Q. Anything else said that you remember?

A. He was asked—

Q. Was anything said about McKinnon that you can recollect?

A. About McKinnon?

Q. Yes.

A. Well, he stated that he didn't get along with him aboard the ship. He tried to get him fired, I think, the trip before the last trip that they made.

Q. Well, do you recall anything else that he stated at that time?

A. I remember that he said that he did it, and he was asked where he had got the hammer, and he stated that he didn't remember—didn't remember anything about where he got the hammer.

Q. Now, at the time he was making these statements before the coroner's jury, did you have occasion to observe his demeanor?

A. He seemed to be quiet—didn't seem, to my mind—he seemed to be all right.

Q. Well, what can you say as to his responses to questions, Mr. Jarrett?

A. Oh, he answered them as they were asked. He made the answers freely and willingly.

Q. What can you say as to the situation or reservation on his part, when questioned?

A. I didn't notice any.

Q. Was he nervous during this conversation?

A. Didn't seem so to me.

Q. After the coroner's inquest was over, did you see him again?

A. After it was over?

Q. Yes.

A. He was turned over to Marshal Hendry, Mr. Hendry.

Q. Did you see him again that night?

408 A. I saw him now and then on the wagon as he came past here.

Q. On that particular night?

A. On that night, no.

Mr. RAWLINS. That's all.

Mr. THOMPSON. No cross-examination.

409 E. R. HENDRY, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. RAWLINS:

Q. What official position do you hold in the Territory of Hawaii?

A. Marshal for this Territory and district of Hawaii.

Q. How long have you been marshal?

A. I have been in the office since the court was first established, January 4th, 1900, first as chief office deputy and then as marshal. I think I was first made marshal on the night of September 17th, 1901, on the death of Mr. Ray.

Q. Do you know this defendant, John Wynne?

A. I do.

Q. Do you remember the occasion of his first coming into your custody?

A. I do.

Q. Where was that, Mr. Hendry?

A. In the station house in Honolulu, the police station, I believe you call it.

Q. What time of day or night was that, Mr. Hendry?

A. It was at night, as near as I can remember, somewhere, perhaps, between 9 and 10 o'clock, when I took him.

Q. Prior to your taking him into your custody did you see him?

A. I did; yes, sir.

Q. Where was he?

A. I saw him when they were holding the coroner's jury?

Q. Was he present at the coroner's jury?

A. I saw him there; yes; he was.

Q. Did you hear him make any statement at that time?

A. I don't remember if I did; I didn't charge my mind with it, because I was tired, the thing had dragged along, and I went  
410 to one of the back windows so I didn't hear all that went on.

Q. Did you take occasion to watch the demeanor of this defendant at that time?

A. Well, no; I don't know that there was anything about his demeanor that attracted me in any way.

Q. After you had taken him into your custody what was done with him, Mr. Hendry?

A. He was brought up here to this building.

Q. And what was done to him then?

A. The warrant was read to him, and Mr. Hatch committed him to my custody to take him to jail.

Q. Now, on the way from the station house to this building did you have any conversation with the defendant?

A. Well, I don't know that I had any. I don't remember of any particular conversation except, of course, that he was, he knew that he was taken in custody by myself in the station house, and we rode up here in the patrol wagon. During the ride he did say "Is the man dead?" but I made no answer to him, and I didn't hear anything else?

Q. At the time you arrested him in the station house did you tell him what he was arrested for?

A. I think I did, but I am not positive. I may have told him I had a warrant for him.

Q. Now, after he was brought by you up here, Mr. Hendry, was anything said or done by the defendant himself?

A. The warrant was read to him here, and he said "The man is dead, then."

Q. And what was done with him after that?

A. He was taken over to the jail.

Q. Now, after that night, did you see him again?

A. The next day Mr. Breckons had him brought to his office.

411 Q. Who was present in Mr. Breckons' office on that occasion?

A. Mr. Reeves and Mr. Breckons, and I think Mr. Hatch, possibly, but I don't remember fully.

Q. Was anything said to this defendant by Mr. Breckons on that occasion?

A. Mr. Breckons cautioned him about speaking, as he always does; that is, that anything he said could be used against him, he needn't answer any question if he didn't want to.

Q. What did the defendant say?

A. He said he was perfectly willing to talk at that time.

Q. And did he talk, Mr. Hendry?

A. Well, yes, he answered Mr. Breckons' question, I think.

Q. Do you recall any portion of the statement that he made that day?

A. I don't know that I can clearly recollect.

Q. Was anything said in reference to the offense, that you can recall, with which he was charged with the commission of?

A. No, I don't know that I can recall clearly what he did say at that time.

Q. Can you recall anything that he said in reference to McKinnon on that occasion?

A. I think he was asked why he did it, and answered that it was in a fit of passion.

Q. And did he say in there any other thing relative to McKinnon, on that occasion that we are talking about, that you can recollect?

A. I think he complained that one of the engineers had given him a calling down for something about his duty, something like that, but I don't remember clearly all that he did say, and it is not clear enough so that I want to make a statement of it.

Q. Was anything said on that occasion that you can remember of relative to why he had committed the offense, or where it had been committed?

412 A. Oh, I think he said he had had some trouble with McKinnon.

Q. Was anything said relative to the means by which the offense was accomplished?

A. Well, I don't remember that.

Q. Do you recollect anything being said on that occasion about a hammer, Mr. Hendry?

A. Why, I think—I don't know whether that—it was supposed to be done with a hammer, but I don't know whether it was in there or where.

Q. At the time that he was talking in Mr. Breckons' office what was his demeanor?

A. Well, just the same as he is now.

Q. From what you observed there, was he able to comprehend the questions put to him?

A. Oh, yes, he answered I think; he didn't impress me as being other than normal at that time.

Q. What can you say as to his responses, were they made with hesitation or reserve?

A. Not that I remember of.

Q. And this night that he was taken into your custody, Mr. Hendry, what was his demeanor then?

A. Well, what do you mean?

Q. His demeanor when he was taken into your custody at the station house, from that time till he was sent back to the jail, did you have occasion to watch his actions?

A. I saw him, just as I see anyone that I would arrest; there was nothing out of the way, particularly, with him, except—

Q. When the warrant was read to him and he made the statement that the man was dead—

A. Then I think he was answering his own question, that he had asked in the wagon, and I think I said "Yes," I think I told him that he was dead.

413 Q. Well, did he appear to be nervous on that occasion?

A. No, I didn't notice any.

Cross-examination by Mr. THOMPSON:

Q. You haven't any very distinct recollection in regard to the conversation, have you, Mr. Hendry, on that night?

A. Well, I am perfectly clear on the point that in riding I think I sat next to him in the wagon, and he asked the question "Is the man



dead?" I know I didn't answer and I didn't hear anyone else answer.

Q. That is all you remember of the conversation that night?

A. Yes, sir.

Q. Now, in Mr. Breckons' office, you have testified with some hesitancy in regard to conversation there; your memory is not very clear on that, is it?

A. Well, I think I have stated that it is not very clear.

Mr. THOMPSON. That's all.

Mr. RAWLINS. That's all.

414 DAVID KAAHANUI, called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. RAWLINS:

Q. Do you want an interpreter, or do you want to talk in English, David?

A. (By interpreter.) He wants an interpreter.

Mr. THOMPSON. If there is any necessity for it I have no objection, but respectfully submit that if possible the proceedings should be in English.

(After some argument between Mr. Thompson and Mr. Rawlins as to whether an interpreter was necessary for this witness, and Mr. Thompson finally admitting that it was a matter within the discretion of the court, the court ordered that the examination proceed through an interpreter, and the following examination was conducted through the medium of the sworn Hawaiian interpreter of this court.)

By Mr. RAWLINS. Q. What is your full name, please?

A. David Kaahanui.

Q. And you live here in Honolulu, do you?

A. Yes.

Q. You were formerly a member of the police force, were you not?

A. Yes.

Q. How long were you on that police force?

A. One year.

Q. You were also a member—I will ask you if you know this defendant, have you ever seen this defendant before?

A. Yes.

Q. You were a member of the coroner's jury, were you, that sat over the remains, deliberated over the death of A. F. McKinnon?

A. Yes.

Q. Did you see this defendant there on that occasion?

A. I did not.

415 Q. Do you remember his appearing before the coroner's jury?

A. Yes.

Q. And when he appeared before the coroner's jury, I will ask you if you had occasion to watch his demeanor or notice his demeanor?

A. Yes.

Q. Now, will you tell us, so far as you are able, all you—of his actions there, how they impressed you at that time?

A. What I remember of him at the time was that he was physically well and he spoke to us in nice language.

Q. Was there any hesitancy or reservation in his responses to questions?

A. No.

Q. Kaahanui, have you ever had occasion to have much to do with drunken men?

A. Yes.

Q. You have seen them after they have been drunk, have you, the day after?

A. Yes.

Q. From what you saw of this man on that day when he testified before the coroner's jury, did he impress you as just about getting over the effects of a spree or a drunk?

A. Yes, he was not a drunken man; yes, but he was not a drunken man as I saw him.

Q. Well, now, what do you mean by this "Yes, he was not a drunken man," can you explain that? Withdraw that last question, and ask that the answer be read and the question asked; I would like to have that answer explained.

The COURT. I glean this, that he did appear like a man who was getting over a debauch of the day before, but who was not a drunken man.

Mr. RAWLINS. I don't think he did mean that.

416 The COURT. Ask the question over again.

Mr. RAWLINS. Q. Now, from what you saw of that man that night, did he have the appearance of a man who was getting over a drunk?

Mr. THOMPSON. Now, that is not fair, "A man who was getting over a drunk." (Argues.)

The COURT. I think you should make it conform to the facts, by saying a man who had been on a drunk the day before.

Mr. RAWLINS. Q. From what you saw of that man that night did he have the appearance of a man who had been on a drunk the day before?

A. No.

Q. How long was he there where you were, Kaahanui?

A. I couldn't say.

Cross-examination by Mr. THOMPSON:

Q. What do you mean when you said in answer to Mr. Rawlins' question, the first time, as to whether or not he appeared as if he had been on a drunk the night before; you said "Yes, but he didn't appear to be drunk at that time?"

A. Well, the intent of my answer to Mr. Rawlins' question was that he was a good man.

Q. That he was a good man?

A. A good man.

Q. And then when you said "Yes," it didn't mean anything at all, is that it?

A. Well, that is about the same as I answered it before.

Q. No, you answered the first time, when Mr. Rawlins asked you if he appeared as a man who had been drunk the night before, "Yes, he was not drunk at that time," and then added "Yes, but he did not appear to be drunk at that time." I want to know what you meant by answering the question "Yes."

A. Well, my answer to Rawlins' question was when he asked me if the man was drunk, I said "Yes, but he was not drunk."

Q. Now did you understand Mr. Rawlins when he was  
417 arguing this question to the court?

A. No.

Q. Did you understand me when I was arguing it to the court?

A. No.

Q. Did you understand the court when he was arguing it to us?

A. No.

Q. The proceedings before the coroner's jury were in English, were they not?

A. Yes.

Mr. THOMPSON. That's all.

By a JUROR (Mr. Lucas). Q. Was there an interpreter down there at that proceeding?

A. No.

Mr. RAWLINS. That's all.

418 S. L. AYLETT, called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. RAWLINS:

Q. Your full name, please.

A. S. L. Aylett.

Q. You are a brother of Bob Aylett, are you not?

A. Yes, sir.

Q. Do you know this defendant, did you ever see him before?

A. I saw him once.

Q. Where?

A. Sometime last year.

Q. Where was it that you saw him?

A. At the police station.

Q. How did you happen to see him at that time?

A. Well, I was summoned for coroner's jury.

Q. Were you one of the jurors that sat?

A. I was one of the jurors.

Q. Did he appear before the jury?

A. Yes.

Q. At the time that he came before that jury, Mr. Aylett, did you watch his actions there?

- A. Oh, yes, pretty close; I was pretty close to him.
- Q. And have you ever had any experience with drunken men?
- A. Oh, yes.
- Q. Have you ever had experience with men, or associated with men, or watched their actions the day after they have been on a drunk?
- A. I know it myself.
- Q. You have been in that condition yourself, have you?
- A. Over twenty-seven years ago, yes.
- Mr. THOMPSON. Q. How many years ago?
- A. About twenty-seven.
- 419 By Mr. RAWLINS. Q. Now, Mr. Aylett, from what you saw of this man's actions that night, when he appeared before that coroner's jury, what can you say as to—
- A. No different as it is now, as far as my memory brings me to; no different.
- Q. Did he impress you as being a man getting over a jag the day before?
- A. No different than what he is now, as I see him now at the present time; that is just as he looked when he was there, only his clothes was different.
- Q. How did he appear when the questions were asked him?
- A. Oh, very bright.
- Q. Did he answer quickly?
- A. Oh, yes, as any other ordinary man would.
- Q. Was there any hesitation on his part to the questions?
- A. Not to my knowledge at that time.
- Q. How close were you to this man?
- A. I was this way, and another man on this side, and about to there; no, I think that place is too far; a little up this way; one juror here about like that; he was sitting this way and we were facing him. [Witness illustrates his answer by pointing around the court room.]
- Q. Was he facing you, or did you have a few seats away?
- A. He was facing to a big table—the side of the table—and we were around the table.
- Q. Was there anything unusual in his actions that night?
- A. No; not that I know of.
- Cross-examination by Mr. THOMPSON:
- Q. You had never seen him before?
- A. Not before that; no.
- Q. That was the first time you ever saw him, wasn't it?
- A. Oh, yes.
- Q. Now, did he appear to be nervous?
- 420 A. Not to my knowledge.
- Q. He looked just like he is now?
- A. Just like.
- Q. He was calm—composed?
- A. Calm; yes.

Q. And answered questions when asked them in a deliberate manner?

A. Deliberate manner.

Q. As if he understood all about it?

A. Yes.

Q. And at no time did he hesitate?

A. Not that I know of.

Q. When a question was asked him he immediately spoke up—spoke up in a quick manner?

A. He waited a little bit in his answer.

Q. And then answered clearly and readily?

A. Yes.

Q. All the time he was there did he fi'get around?

A. I never noticed that; saw him move around; he was sitting as quiet as he is now. He was looking down a little bit, and then would raise his head up and answer.

Q. He didn't appear to be nervous?

A. Not so far as I could see.

Q. Did he ask any questions himself?

A. Who—I?

Q. He; did he ask any?

A. I don't think he did.

Q. If he had would you have heard him?

A. Oh, sure.

Q. You were so close you wouldn't have missed any?

A. No.

Q. He didn't ask anyone anything at all?

421 A. Did not, that I know of. You have got to speak loud, or else I can't hear; this ear is kapu.

Q. Well, give me the good ear, then. When he answered the question did he answer them as loud as I talk?

A. I was closer to him than you are.

Q. All right; let me come up here. [Moves nearer witness.] Now did he answer questions any louder than I am talking?

A. About as loud as you; a little louder.

Q. You have no trouble in hearing me now?

A. No; not at this time.

Q. Have you any trouble in hearing me?

A. Not much trouble.

Q. No trouble at all?

A. Not now; when you are speaking loud.

Q. Well, you can hear me now?

A. Not very well.

Q. Give me your good ear?

A. All right.

Q. You heard that, didn't you?

A. Yes.

Mr. THOMPSON. That's all.

Mr. RAWLINS. That's all.

(At this point there arose a question as to whether Mr. Hopkins, the official Hawaiian reporter of this court, had previously been sworn for this term, Mr. Hopkins being of the opinion that he had not been so sworn, whereupon the following proceedings were had:)

Mr. THOMPSON. I don't want to go back and take this evidence all over again, and I don't want to be captious; I am willing to stipulate that Mr. Hopkins was sworn.

The COURT. Then you will waive any objection, and we will swear him now.

422 Mr. THOMPSON. I am perfectly willing.

(Hereupon Mr. Hopkins was sworn as Hawaiian interpreter for the term.)

Court here adjourned, and the further hearing of this cause was continued until Monday, November 2nd, 1908, at 10 o'clock a. m.

423

NOVEMBER 2, 1908—MORNING SESSION.

E. B. FRIEL, called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. RAWLINS:

Q. Your full name, please.

A. Edward B. Friel.

Q. Mr. Friel, I will ask if you remember the coroner's jury which held an inquest over the remains of one A. F. McKinnon?

A. I do.

Q. I will ask you if on that occasion you saw this defendant?

A. I did.

Q. State whether or not he made any statement at that time?

A. Yes, he did make a statement.

Q. Did you hear what he said?

A. To the effects that he didn't remember anything that he had done, or that had been done, and didn't realize what he had done until the next morning.

Q. Anything else that you can recollect?

A. When he was asked in regard to if he did it, he said he did. Asked if he remembered using a hammer, to my recollection he said he did not.

Q. At the time that he made this statement, were you in a position to observe him?

A. Yes, sir, I was; I sat beside the table, right opposite; he sat at one end and I at the other, right opposite to him.

Q. Will you kindly relate what you observed in him at that time, as to his actions and condition?

A. I didn't observe anything out of the way; he seemed to be quite cool and collected.

Q. As to his responses to questions, were they made with  
424 hesitation and reserve, or were they spontaneous and freely made?

A. No, he didn't hesitate.

Q. Was there any signs of nervousness displayed by the defendant at that time?

A. Not to my knowledge; I didn't notice any nervousness; he seemed to be as cool as he is now.

Mr. RAWLINS. Cross-examine.

Mr. THOMPSON. No cross-examination.

425 SAM KOLOA, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination:

Mr. THOMPSON. I assume from the interpreter being here that the testimony is to be interpreted. If so, I would like to know whether or not the witness speaks English. I know nothing about it.

Mr. RAWLINS. If your honor wants me to make the same statement as I did in regard to the other witness, I am willing to make it.

The COURT. Ask him if he can testify in English.

(Interpreter puts question to witness.)

A. Not very well.

Mr. THOMPSON. May I ask him some questions as to how much he knows. (To witness.) Q. Do you speak English, Sam? I am talking to you now in English.

A. A little.

Q. What's that?

A. A little.

Q. Did you ever go to school? Sit down, I don't care to have you stand up. Did you ever go to school?

A. (Witness speaks to interpreter in Hawaiian.)

Q. Talk English to me, I can't understand native any better than you think you can't understand English. Did you ever go to school? Talk English to me, I can't understand you.

A. (Witness speaks in Hawaiian.)

The COURT. He says he went to a Hawaiian school, a school where the Hawaiian language was used.

Mr. THOMPSON. Q. Can you read English?

A. (Through interpreter.) Words of two letters I can.

Mr. THOMPSON. I guess he had better have an interpreter.

(The direct examination of this witness, through the official Hawaiian interpreter, was here proceeded with as follows:)

By Mr. RAWLINS. Q. What is your full name?

426 A. Sam Kalanea Koloa.

Q. Where do you live, Sam?

A. Alewa.

Q. During the month of September, 1907, what was your occupation?

A. Turnkey.

Q. Turnkey where?

A. At the station house.

Q. And how long did you occupy that position?



A. One year and nine months, until I quit.

Q. I will ask you if you have ever seen this defendant before?

A. Yes.

Q. And where did you first see him?

A. At the receiving station, where the clerks are.

Q. Who was present? State the circumstances connected with your first seeing this defendant.

A. I am a turnkey and my place is down below. There is a lower place there from the police station, and whenever a jailor is wanted the bell is rung; so when the bell rang I went up and when I got up I saw the defendant, and then Lieutenant Hart ordered me to search him. So, when I searched him I found a watch, a book in this outer coat pocket, and \$4.25 from him.

Q. Now, during the time that you were searching him, did you say anything to him or did this defendant say anything to anybody there present?

A. It was the defendant who said that he had some money with him.

Q. Who did he say that to?

A. He spoke to me, and when he said that, when we went to get the money, he passed the money over, \$4.25.

Q. Now, will you tell us what you know in reference to his actions on this occasion, when you were searching him there at the receiving station?

427 A. Of course, as a turnkey or jailor I was quite close to him, because my duty required I should be close to him to search him, and his mouth was close to mine and I could smell the smell of liquor on him—that he had been taking liquor.

Q. What else did you notice there; what did he do?

A. About then he was ordered to be taken down, and I took him down.

Q. Now, what have you to say in reference to his condition as to sobriety at that time?

A. At the time he said nothing, and I was ordered by the officer to take him down, so I took him down and put him into a cell.

Q. Well, answer the question. What can you say in reference to his sobriety at the time that you searched him?

A. Well, I judged from the way that he was there that he was not drunk; but he had been drinking some liquor, and, of course, a drunken man would stagger about, and when he walked down the stairs he walked as any other ordinary man would walk.

Q. What cell did you put him in there—what number?

A. Well, I put him into a cell where people do criminal acts.

Q. Well, what is the distance from that receiving station down to that cell, which you say he walked?

A. I think it was seventy feet or more.

Q. And during the time that he was walking that distance, were you in a position to observe him?

A. Yes, I did, because I had hold of one hand. That is the rule or the custom there, to take hold of the culprit, or whoever he is, in taking him down.

Q. Well, what can you say as to his sobriety at that time?

A. Well, I took him down and put him into the cell. Now, the cell down there has an entrance—that is, a door to enter in—and that is on the other side. There is a bar on the window, so I came around to where this window was in the hallway—

Mr. THOMPSON. Move it be stricken out as not responsive,  
428 and that the jury be instructed to disregard it.

Mr. RAWLINS. No objection.

The COURT. It may be stricken out.

Mr. RAWLINS. Q. My question is this: At the time the man was being taken from the receiving station to the cell, from what you observed of him, what can you say in regard to his sobriety?

Mr. THOMPSON. Objected to as asked and answered.

The COURT. Overrule the objection. A man standing still might not show signs that he did while walking.

Mr. THOMPSON. Exception.

Mr. RAWLINS. Q. Answer the question.

A. He was not drunk.

Q. Now, after you got him into the cell, Sam, did you see him again?

A. After locking him up I came around to this window, and, as I said before, my English is not of the best—that is, it is broken English, or part English—so I said to him, "What for you kill that man?" and he said, "I was drunk."

Mr. RAWLINS (to interpreter). He said "I am drunk," didn't Sam say? (To witness.) Will you kindly tell us, in English, what you said to this defendant, and tell us in English what he said to you, and say it slow so we can hear it?

The WITNESS (in English). A. "Say, what's the matter you killed that man?" and "I am a drunk." (Through interpreter.) So just about then other drunks were coming in, so I left him and went to attend to the other people.

Q. Now, what time did you leave the station house that night; change your watch?

A. At quarter to eleven I left the place.

Q. After you had this conversation with him which you have just related, did you see him again that night?

A. I saw him walking up and down the cell, and then sat on the bed there facing towards the door, and I looked from behind.

429 Q. Now, did you see him again the next day?

A. I saw him again the following day, about 4 o'clock in the afternoon; that is, my watch came on about four o'clock in the afternoon.

Q. Where was the defendant at that time?

A. He had been let out by another turnkey who succeeded me—walking about in the yard with other people.

Q. And did you have occasion—did you have any conversation with him on that occasion, or did he say anything to you?

A. Well, the turnkey that I succeeded. Maana, told me that—

Mr. THOMPSON. Object to what he told him.

Mr. RAWLINS. I am asking what you yourself said and did with this defendant.

Mr. THOMPSON. I ask that the jury be instructed to disregard what the turnkey told him, as the witness told it all in Hawaiian, and there are some on the jury who understand that language.

The COURT. If there is anything before the jury as to what the turnkey told him, that is not in this case and not to be considered.

Mr. RAWLINS. Q. Will you relate anything that transpired between you and the defendant after you came on watch that afternoon?

A. When I went on watch he was then going about inquiring for a newspaper, and he came to me and asked for a newspaper.

Q. Tell us in English what he said to you?

A. (Answers in Hawaiian.)

Q. I want you to tell us in English what you said about that newspaper, and what he said to you?

A. (In Hawaiian, through interpreter.) Seeing the defendant going about here and there I felt somewhat frightened, knowing that he had done something of a very grievous nature, so when he asked me for a newspaper, I said "I have no newspaper." (In English) He said "Say, you got paper?" I said, "No, no paper."

Q. Now, after you told him that you had no paper what did  
430 he do or say, if anything?

A. (In English.) "How's that man go in the hospital?" "A little better; I hear he is eating pudding."

Q. Say that over again, and say it slow, what he said to you and what you said to him.

A. (In English.) He said "I got no paper; how's that man in the Queen's Hospital?" I asked "Oh, that man's a little better; he is eating pudding."

Q. You said that?

A. (Through interpreter.) Well, my reason for stating that was—

Mr. THOMPSON. Object to the reason.

Mr. RAWLINS. Q. After you told him this, Sam, what did he do or say, if anything?

A. Well, when I told him that he had a fierce countenance on him, and then he commenced to walk up and down, and I said no more to him nor he to me.

Q. Now, what time did you go off duty that day?

A. Eleven o'clock at night.

Q. Now, after you had this conversation with him, where he asked you the question in reference to the condition of the man, did you again have any talk with him?

A. That was the only conversation there was; no more.

Cross-examination by Mr. THOMPSON:

Q. Where do you work now, Mr. Koloa?

A. Campaigning.

Q. You are out campaigning, working at politics, are you?

A. Yes.

Mr. THOMPSON. That's all.

Mr. RAWLINS. That's all.

431 MAANA, called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct examination.

Mr. RAWLINS. Q. I will ask you, what do you prefer, to talk in English or through an interpreter?

A. In Hawaiian.

Mr. THOMPSON. That is not a matter of preference. (To witness.)

Q. Do you speak English, Mr. Maana?

A. No.

Q. Not at all?

A. (Through interpreter.) A little.

Q. Well, talk English the best you can in answering me now.

A. I understand Hawaiian.

By Mr. THOMPSON. Q. Did you ever go to school?

A. Yes.

Q. Where they taught English?

A. No; Hawaiian.

Q. Can you read English?

A. No.

Q. Can't read a newspaper in English?

A. No; Hawaiian. Only a few lines.

Q. Well, do you read the evening papers or the morning papers now in English?

A. Yes.

Q. Every morning and every evening?

A. Yes.

Q. You understand fairly well what is in them?

A. Some I understand, some not.

Q. You keep informed as to the political situation from the newspapers, don't you?

A. I don't understand that.

432 Q. Don't you understand what I said to you?

A. No.

Q. How do you get your ideas about politics, whether McCandless is going to be elected or Kuhio, or Notley; do you get it from the newspapers?

A. From Hawaiian newspapers.

Q. How often do you get the Hawaiian newspaper?

A. Buy it.

Q. How many days in the week?

A. Six.

Q. Sis days in the week; don't get it on Sunday?

A. No.

Q. Do you read the Advertiser on Sunday?

A. Yes.

Mr. THOMPSON. Let him talk in Hawaiian.

(The direct examination of this witness was here proceeded with through the official Hawaiian interpreter, as follows:)

By Mr. RAWLINS. Q. What is you name?

A. John Maana.

Q. What occupation do you follow?

A. Policeman.

Q. And how long have you been a police officer?

A. From the 8th of February up to the 8th of October.

Q. 8th of February of what year?

A. 1907.

Q. During September, 1907, were you—what duties were you performing in reference to being a police officer?

A. Turnkey at the station house.

Q. I will ask you if you have ever seen this defendant before?

A. Yes.

Q. Where did you first see him?

A. On the 21st, eight o'clock in the morning.

433 Q. What month?

A. September.

Q. In the year 1907?

A. Yes.

Q. Where was he when you first saw him?

A. In cell No. 1, where the criminals are locked up.

Q. Did you have any conversation with him that day?

A. Yes.

Q. What was that conversation?

A. Between 9 and 10 of that morning, when he was looking out through the window, he called out "Turnkey;" so I went over to him and then he asked me if I had the morning newspaper. I said no, I had no newspaper.

Q. What else, if anything?

A. So after that I asked him if he wanted to go out, that I would open the cell door for him to go out; he said "Yes." I opened the door and allowed him to walk up and down the yard, watching him at the same time.

Q. Did you have any further conversation with him during the day?

A. In the afternoon; that is, after twelve o'clock.

Q. What was that?

A. He asked me if I had got the evening paper, or the afternoon paper, so when I told him that I had no newspaper, then he asked me about the man that was hurt, at the hospital.

Q. Tell us in English what he said about that?

A. (In English.) He ask me if I had afternoon paper; I said "No paper down here." Then he said "You hear about that man in the hospital?" I said "What man?" "Well, that man, did you hear the man last night?" I said "I never hear about that man." (In Hawaiian.) Well, most of what he said, the substance of that conversation, was in reference to that man in the hospital.

434 Q. Well, now, after he spoke to you, what did you say, if anything?

A. I didn't say any more.

Q. And was that the end of any conversation you had with him during that day?

A. Yes.

Q. Now, you say that you watched him during the day when he was in the yard. What can you say as to his actions?

A. Well, watching him as he was walking up and down, I saw he was holding down his head, as if he was thinking of something.

Mr. RAWLINS. Cross-examine.

Mr. THOMPSON. No cross-examination.

Mr. RAWLINS. That's all.

435 C. MADESON, called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. RAWLINS:

Q. What is your full name?

A. Charley Madeson.

Q. What is your business, Mr. Madeson?

A. Master mariner.

Q. How long have you been a master mariner?

A. For the last twelve years.

Q. During the month of September, 1907, where were you?

A. In the month of September, part of September, I was lying here in Honolulu Harbor.

Q. In what vessel, Captain?

A. Ship "Marion Chilcoat."

Q. And at the time you were here on the "Marion Chilcoat" I will ask you if you ever saw this defendant?

A. Well, now, that is a thing I couldn't say; I didn't see the man, it was dark when I was there. I couldn't place the man, it was dark when I saw him. I never saw the man.

Q. Do you know the steamship "Rosecrans?"

A. Yes.

Q. At the time you were here on the "Marion Chilcoat" state where the "Rosecrans" was?

A. Alongside railroad wharf No. 1.

Q. Where was your vessel?

A. Lying outside the "Rosecrans."

Q. During the time you were there, did you have occasion to go aboard the "Rosecrans" during any night?

A. Yes; Captain Holmes called me aboard the "Rosecrans" one night.

Q. What time was it when you were called, Captain?

A. I should judge between 9 and 10; I was in bed and I  
436 didn't look at the time; it was somewhere around between then.

Q. Did you go aboard the "Rosecrans?"

A. Yes, I came right over.

Q. What did you see when you got there?

A. I saw there was a man hurt, and I went into his room and looked at him, and tried to stop the—there was no possible way, the blood was out of the man when I got over there, as soon as I got there.

Q. Where was this room; what part of the ship?

A. On the port side of the vessel.

Q. Was there anybody else there when you got there?

A. The second officer was in the room, and all the men stood around, the whole crew of the ship there, so far as I could make out.

Q. What was done in reference to this man that you saw injured?

A. It appears to me that—like a man hurt with a hammer or with some instrument, but I couldn't say, because the man was turned over and I couldn't see the scar, but I could see the blood was running out of him, and all over the room, and he was badly hurt.

Q. Well, what was done with the man?

A. All I done I bathed the sore as much as I could, and any places I saw in the head where it was worse cut I tried to stop the blood, but I saw there was no stopping it; his heart was fluttering, I could see there was life in him.

Q. What part of the room was this man in?

A. Lying on the settee.

Q. Did they leave him there or take him away?

A. After I seen I couldn't do any more they took him in the fresh air and had him on deck. When I see there was no more to be done, no more blood in him, then we took him out in the fresh air.

Q. Now, when you were out on deck did you hear any conversation on deck relative to this matter?

A. Well, there was a little talk around there, but nothing I  
437 could remember now.

Q. Did you see the prisoner on that occasion?

A. I stood alongside of him for about two or three minutes.

Q. How did you come to get alongside of him?

A. Well, I was standing alongside of the man there, and Wirshuleit, the first officer, said "Look out for him he don't go ashore, while I go and get my nippers," and that was only a few minutes, and he put the nippers on him.

Q. During the time you were standing talking to this man, what was the conversation—was there any conversation between you and the man that you were standing alongside of?

A. No, sir; not that I remember; no conversation. I asked him no questions; only he said "I done it."



Mr. THOMPSON. Q. Said what?

A. He done it.

The COURT. Q. He said "I done it?"

A. Yes, sir.

Q. To you?

A. Yes, sir.

Mr. RAWLINS. Q. Was there anything else said that you can recollect?

A. Well, he passed a few remarks there, but I didn't take much notice of it, as I didn't have no business on board that vessel, and left everything to the first officer.

Q. These few remarks that were passed, can you remember them?

A. Yes; I remember he said "I killed him, and I am glad I killed the son of a bitch." That is the very words I heard him say.

Q. When you were alongside of him, Captain, state whether or not you had hold of him.

A. Didn't have hold; just stood alongside of him. There was no occasion to have hold of him; the man stood right there; he told me he wouldn't run away.

438 Q. He said he wouldn't run away?

A. Yes; that is what he told me when Wirschuleit told me to look out for him; he said "I wouldn't run away."

Q. Now, how long was this when the first officer turned him over to you and he said "I won't run away?"

A. That was just a few minutes, when the first officer went to get his nippers.

Q. How long was that after you got aboard the "Rosecrans?"

A. I should judge about ten or fifteen minutes—something like that.

Q. What can you say as to the man's actions when he was there alongside of you?

A. Well, so far as I could see, the man was cool and reasonable, as much as I could see the few minutes I seen him.

Q. What can you say as to whether he was drunk or sober?

A. He wasn't drunk; I couldn't say that—that he was drunk.

Q. You couldn't say he was drunk?

A. No.

Q. Was there anything in his speech or his actions or demeanor at that time which indicated a drunken condition?

A. No, sir; not that I could see.

Cross-examination by Mr. THOMPSON:

Q. When he said "I killed him—I killed the son of a bitch and I am glad of it," was that when he was first turned over to you?

A. That was when I was standing around there—just as Wirschuleit asked me to when he walked away to get the nippers.

Q. Who went to get the nippers?

A. The first officer.

Q. Were you there when he was talking to Reed?

A. Well, now, that I couldn't say, because there was so many men around there, and it was dark. I couldn't tell who he was  
439 talking to; I scarcely know the men, only the captain and purser and chief engineer.

Q. Do you know Mr. Reed?

A. Yes, sir.

Q. Was he there at the time?

A. Yes, sir; in the room helping to stop the blood.

Q. And when you stepped out of the room did Reed go out with you?

A. Yes, sir; Reed went along.

Q. And it was then that he said——

A. It was after we took McKinnon out on deck.

Q. It was after that that he said to somebody, "I killed the son of a bitch, and I am glad of it?"

A. Yes, sir.

Q. That was the time?

A. That was the time.

Q. You didn't get a look at him, did you?

A. Who?

Q. At the defendant?

A. No; not so I could prove that was the man; it was too dark around there.

Q. When you say so far as he looked he looked sober; you didn't get any look at him at all?

A. Well, the man was there, I could see he wasn't drunk; a man drunk couldn't stand up.

Q. That is your idea, is it, that a man is drunk when he can't stand up?

A. Well, if a man is drunk there will be some actions so you can see that.

Q. What does a man have to be in order to be drunk, paralyzed?

A. No.

Q. Tell us what he has to be.

A. A man drunk always shows some action that ain't right; he is always kind of nervous.

440 Q. He was leaning on the pin rail when you came out?

A. No, sir; not on the pin rail until afterwards.

Q. When Reed and you first came out of the room was he leaning on the pin rail?

A. That I couldn't tell you, because that is the time we took McKinnon out and was bathing him with water.

Q. When you and Reed took McKinnon out was he leaning on the pin rail?

A. No; he was close—I don't know whether he was or not.

Q. You don't know whether he was at the pin rail or standing away from the pin rail?

A. I couldn't say for sure.

Q. Are you sure there is a pin rail where he was standing?

A. Yes, sir; there was.

Q. How far away?

A. I couldn't answer.

Q. You don't know how far it was?

A. I couldn't answer that.

Q. Then, you know there was a pin rail there, but you don't know whether he was leaning against it or not?

A. There is a pin rail there; I know that.

Q. Was his back turned towards you, or his face?

A. His face was turned to me.

Q. And it was so dark you couldn't see him so you could recognize him now?

A. I couldn't swear to recognizing him now.

Q. Was it because it was dark or because you were excited?

A. I wasn't excited at all.

Q. You were cool and collected, were you?

A. So far as I know.

Q. You were cool and collected?

A. I was.

441 Q. And you remember everything that went on there?  
Yes; so far as I know.

Q. And so far as you observed, you remember everything that you saw, don't you?

A. Yes, sir.

Q. Where was Reed standing at the time he spoke to you, do you remember?

A. No; that I don't remember.

Q. You said in the first place that he made some remark. "I done it," is that the expression he used?

A. Yes, sir.

Q. That is the very expression, is it, "I done it?"

A. Yes, sir; I heard that.

Q. Then you said further that he made some other little inconsequential remarks, which you didn't remember, and then, upon a little goading you said he said, "I done it, I done it——"

Mr. RAWLINS. Object to that, as there has been no goading here that I can see. Object to this statement of counsel here, in the presence of this jury, that there was any goading of this witness. He can ask a proper question, based upon the direct examination, if he so desires. There is no reason to use the word "goading," it is improper. [Argues.]

Mr. THOMPSON. There is nothing before this court. Object to counsel getting up and making speeches to the jury, without making a valid objection. [Argues.]

The COURT. His objection is that you referred to something which has not happened.

Mr. Thompson argues.

Mr. Rawlins argues.

The COURT. It amounts to an objection that it was improper. I will sustain the objection, because it is not according to the facts, as I have watched the testimony of this witness.

442 Mr. THOMPSON. Object to the remarks of your honor that it was not according to the facts, as your honor had watched the testimony of the witness, that being a comment on the attitude of the witness, and I ask your honor to instruct the jury to disregard your honor's remark, as it is a comment on the attitude of the witness, which should not go to the jury.

The COURT. What I mean, gentlemen of the jury, is that Mr. Thompson's question that he was goaded, or asking him if he was goaded into saying so and so, is incorrect, is improper, because there was no goading so far as the court noticed during the examination.

Mr. THOMPSON. To which latter remarks of your honor I respectfully except, as being a comment on the attitude of the witness and upon a matter of the examination. Whether or not he is goaded is a matter for the jury, and not for your honor. Ask that the jury be instructed to disregard that portion of the court's remarks.

The COURT. These remarks are for instruction as to the examination, and the comment as to the examination. I don't know that the jury has anything to do with that.

Mr. THOMPSON. Q. Captain, you said in the beginning that he made some other little remarks which you didn't remember, did you not?

A. Yes, sir.

Q. You were then further interrogated by Mr. Rawlins in regard to what the remarks were, and you again said "There were some remarks which I don't remember," am I right about that?

A. There was so much talked about there, I don't remember what was said at the time.

Q. There was so much talk around there at the time that you don't remember what was said?

A. What I said here, I heard this expression, as I remember that.

Q. You just came out of Mr. Rawlins' office, didn't you, Captain?

A. Well, we have been in there; I just came from San Francisco.

Q. When you say "we" who do you mean were in there?

443 A. There was four parties that came down that belonged to the ship.

Q. And who else was there besides the four that came from the ship?

A. I guess about eight or ten men there.

Q. Well, tell me some of them.

Mr. RAWLINS. Objected to as incompetent, irrelevant, and immaterial, and improper cross-examination.

Mr. THOMPSON. It is not; I will prove that some of the witnesses who have testified in this trial were in there, and that the captain was in there with them; it is a circumstance to go to the jury.

Q. Kindly tell me who was there.

A. Captain Holmes was there; the chief engineer, Huzar, of the "Rosecrans," was there.

Q. Who else?

A. Mr. Reed was there, and there was several more men there that I don't know.

Q. Was Bright there?

A. Mr. Bright was there; yes.

Q. Did you discuss this case at all there?

A. No, sir.

Q. Not at all?

A. Not at all.

Q. When Mr. Rawlins came in did you discuss it at all?

A. No, sir.

Q. Have you discussed it at all with anybody since you have been here?

A. No; I haven't been out of this place since I got in.

Q. Haven't you discussed your testimony with anybody at all?

A. Not with a soul. Not with anybody, that I know of.

Q. With Rawlins?

A. No.

Q. With Mr. Whitney?

A. No, sir.

444 Q. Did you make any statement at all to Mr. Rawlins?

A. I don't know the gentleman—only that he is sitting there

Q. Did you make any statement before you went away to Mr. Rawlins?

A. No, sir.

Q. This is the first time you have ever spoken to Mr. Rawlins or anybody else in regard to this?

A. It is the first time I have been called up to make any statement of this case.

Q. This is the first time you ever spoke to anybody about it?

A. Yes, sir.

Q. Said nothing to Reed about it?

A. No, sir.

Q. Nor Reed to you?

A. No, sir.

Q. When you took the stand it is the first time you ever mentioned about the case?

A. That is the first time I talked about the case since I left San Francisco.

Q. To anybody?

A. To anybody.

Q. When you left the ship had the body left?

A. The "Rosecrans?"

Q. The body of McKinnon, when you left the "Rosecrans?"

A. The body had left at that time; yes, sir.

Q. You didn't see the defendant then?

A. I didn't see the defendant; afterwards they took hold of him and I didn't see him. The first engineer and chief of police came down and took McKinnon—and took the defendant away.

Q. And he said to you he wasn't going to run away?

A. Yes.

Q. Was that when Reed was there?

A. I don't know where Reed was; he was around there somewhere.

445 Q. Now all that you have said here is all he said?

A. That is all I heard.

Q. If he said anything else you would have heard it?

A. I was right next to him; within two feet of him.

Q. And if he said anything else you would have heard it?

A. I would have heard it, so far as I can say.

Mr. THOMPSON. That's all.

By a JUROR (Mr. Vierra). Q. Captain, did I understand you to say you didn't see that man there, you are not sure it was that man?

A. Yes, sir; I seen that man the first time I came in.

Q. I mean the defendant?

A. That I couldn't swear to.

Q. You couldn't swear that was the man that was there?

A. I couldn't, because I didn't know the man, who it was. It was only a light from the port hole that was there.

Q. How can you state that he said certain words?

A. That is the man I stood alongside of.

Q. Then you are sure that was the man that was there?

A. That I couldn't say; it was the man that was turned over—I didn't know his face, I never see the man before, I was a total stranger to him.

Q. Then how can you tell this is the man that said those words?

A. Well, I stood alongside of the man, within six inches of him; I couldn't see his face, but that is the man that spoke to me.

Q. That is the man that spoke to you, that said those words?

A. That said those words. The chief officer came back, and I seen him put the nippers on him; the first officer.

The COURT. Q. The man they put the nippers on, and that you stood alongside of, and from whom you heard those words you have testified to; you couldn't swear that it was this defendant?

A. No, sir; I couldn't. I was at the time a stranger there, but the man that stood alongside of me was the man that spoke.

446 (By a JUROR.) Q. Nippers, is that what you call hand-cuffs?

A. Yes.

The COURT (to the jury). He is talking about the man that was arrested, turned over to him on board, and he don't know whether it was this man or not. (To Mr. Thompson.) Do you object to that comment by the court?

Mr. THOMPSON. No. The juror brought it out and I have no objection to the explanation of the court.

Mr. RAWLINS (to witness). That's all.

447 WILLIAM STAHL, called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. RAWLINS:

Q. What is your full name?

A. William Stahl.

Q. And what is your position, Mr. Stahl?

A. I was ice man on the boat at the time.

Q. During the month of September, 1907, where were you working?

A. On the steamship "Rosecrans."

Q. And what duties were you performing aboard the steamer "Rosecrans?"

A. Ice man.

Q. I will ask you if you know this defendant here?

A. Yes, sir.

Q. Was he a member of the crew of the "Rosecrans" at that time?

A. Yes, sir.

Q. What was his duties aboard the ship, if you know?

A. Oiler.

Q. And how long had he been aboard the ship?

A. About a month and a half.

Q. Do you remember the night of this trouble aboard the ship?

A. Yes, sir.

Q. Where were you that evening?

A. Aboard the ship.

Q. What time did you go aboard?

A. I came aboard at half-past five.

Q. And after you came aboard, what did you do there?

A. I went down below.

Q. Now, at the time you came aboard did you see the defendant, Wynne?

A. No, sir.

Q. Did you know the third assistant engineer aboard that vessel?

448 A. Yes, sir.

Q. What was his name?

A. McKinnon.

Q. Did you see him come aboard that evening?

A. Yes, sir.

Q. About what time?

A. Little after eight.

Q. And where were you at the time he came aboard?

A. On the after deck.

Q. When he came aboard did you see where he went?

A. He went into his room.



Q. And did he stay in the room, or did he come out of the room, so far as you know?

A. I remember he was lying down, shortly after he came aboard.

Q. You went in and saw him lying down?

A. Yes, sir.

Q. How did you happen to go in there at that time?

A. I wanted to go ashore, and I notified him I was going.

Q. You notified McKinnon?

A. Yes, sir.

Q. And after you notified him what did you do?

A. Went ashore.

Q. How long were you ashore?

A. About ten minutes.

Q. Ten minutes?

A. Yes, sir.

Q. And did you go back aboard the ship then?

A. Yes, sir.

Q. And where did you go?

A. I was standing on the after deck.

Q. What happened, if anything, after that?

A. Nothing that I know of.

449 Q. Did you see McKinnon again that night?

A. No, sir.

Q. Did you see Wynne that night?

A. Not till afterwards.

Q. Well, what do you mean by "afterwards," Mr. Stahle?

A. After McKinnon was killed.

Q. After this thing took place did you see McKinnon?

A. I saw him after he was killed.

Q. And how long after you saw McKinnon did you see Wynne?

A. Well, shortly.

Q. Before this killing that you have testified to here, did you see Wynne?

A. No, sir.

Q. Where was Wynne at the time you first saw him?

A. He was in the port alleyway.

Q. And what was he doing, if anything?

A. He was speaking.

Q. Speaking?

A. Yes, sir.

Q. To who?

A. To no one in particular; he said "I have done it."

Q. And what else did he do, if anything?

A. Nothing else.

Q. Now, did you go to the room of McKinnon after you heard Mr. Wynne make that statement?

A. Yes, sir.

Q. What did you see there?

A. I saw the man laying down, with blood all around him.

Q. Where was he lying?

A. On the settee.

Q. Did you see anything else in the room?

A. No, sir.

450 Q. Well, now, after Wynne made this statement, "I have done it," did you see him again?

A. Well, I saw him when he was taken off, afterwards; he was taken ashore by a policeman.

Q. But between this time when he made this statement in the port alleyway, that he had done it, and the time that he was taken away by the policeman, did you see him?

A. Yes, sir.

Q. Where?

A. On the upper deck.

Q. Who was there at the time?

A. Well, the captain of the "Marion Chilcoat" was there, Captain Madeson.

Q. Was that the gentleman here just before you?

A. Yes, sir. Captain Holmes, the second officer, Reed, several other people there, too.

Q. Now, in reference to where Wynne was, where was Captain Madeson?

A. He was in the third assistant's room at first, then he was on the after deck.

Q. What was he doing on the after deck?

A. Working on McKinnon.

Q. Did you see him do anything else there?

A. No, sir.

Q. Now, while they were working on McKinnon, where was Wynne; that is, on the after deck?

A. Standing up against the rail.

Q. Against the rail?

A. Yes, sir.

Q. Who was there with him, if anybody?

A. I think the first officer was there.

Q. Did you see anybody else?

A. Not that I remember.

451 Q. Now, out on the after deck, while they were working over McKinnon, was anything said or done by Wynne that you heard or saw?

A. He said, "I have done it;" that's all I heard.

Q. Well, that was two times he said that?

A. He said that several times.

Q. Now, during the day, Stahle, that this thing happened, did you see Wynne at all?

A. I saw him on the morning when the ship came in.

Q. Where was he then, aboard the vessel?

A. Aboard the vessel.

Q. Did you see him come ashore?

A. No, sir.

Q. And that is the only time you saw him during the day?

A. That's the only time I can remember.

Q. Now, at the time he was standing there on the after deck, and at the time he was in the port alleyway, what can you say as to his being drunk or sober?

A. Well, he didn't look drunk to me.

Q. You had an opportunity to observe him, did you?

A. Yes, sir; I saw him standing up against the rail; he didn't look like a drunken man.

Q. How long was he out there on that after deck?

A. I can't remember exactly. About half an hour, I think.

Q. And did you see him when he was taken away?

A. I saw him when the policeman came and got hold of him, but I don't remember that I ever saw him go ashore.

Q. Now, what can you say as to the position that the "Rosecrans" was in that night at that dock?

A. She was laying head towards the beach.

Q. Heading in, was she?

A. Heading towards the beach.

Q. And what side was the gangway on?

452 A. On the port side.

Q. Was she close up alongside of the wharf?

A. Pretty close.

Q. Did you, yourself, speak to Wynne that night?

A. No, sir.

Cross-examination by Mr. THOMPSON:

Q. You were on the after deck when you heard him say "I done it," were you?

A. Yes, sir.

Q. How far were you from McKinnon's room?

A. About twenty feet.

Q. About twenty feet?

A. Somewheres around there.

Q. Was there anyone in McKinnon's room beside McKinnon at that time, do you know?

A. When I first came around the second officer was in the room.

Q. Reed was there, was he?

A. Yes, sir.

Q. And was Reed in the room alone?

A. At the time.

Q. Did you rush right up to the room?

A. Rushed right up.

Q. Ran up as rapidly as you could?

A. No; I didn't run.

Q. And when you got there, there was only you and Reed?

A. There was only Reed inside the room.

Q. Who was outside?

A. Well, I can't remember; I was excited.

Q. You were excited?

A. Yes.

Q. Were there many people outside of the room?

A. I can't remember.

453 Q. Do you remember of anybody being there at all?

A. Not any particular one.

Q. Was Captain Madeson there?

A. Not at that time.

Q. Was Captain Holmes there?

A. Not at that time.

Q. Was Wirschuleit there?

A. I am not quite sure.

Q. The only one you remember, then, was Reed?

A. Yes, sir.

Q. Where was McKinnon then—where was Wynne then, anybody have a hold of him then?

A. No, sir.

Q. Was he in the alleyway?

A. He was in the alleyway at first, but went to the after deck.

Q. Walked to the after deck all alone?

A. Yes, sir.

Q. And stayed there?

A. Stayed there.

Q. That is the last you saw of him, he was standing there?

A. The last I saw till he was taken ashore.

Q. He was taken from the after deck and taken ashore?

A. Yes, sir.

Q. How long after you got up there was it before anyone else got there whom you remember?

A. I couldn't remember anyone in particular.

Q. Who was the first person you remember getting there after Reed and yourself?

A. I don't know.

Q. Well, did they all come together, as you remember it?

A. They all came there, but I don't know who came first.

Q. Well, how long was it before anybody came; have you  
454 any idea of time on the subject?

A. Oh, about two minutes, or three, probably.

Q. Two or three minutes?

A. Not more than that.

Q. And how long was Reed in the room before he came out; do you remember?

A. About three minutes, probably.

Q. Did he send for some water?

A. Yes, sir.

Q. And bathe McKinnon with it?

A. Yes, sir.

Q. And after he got through bathing him he came out, did he?

A. After he got through bathing him we carried McKinnon on deck.

Q. At that time there were quite a lot there, were there not?

A. Yes, sir.

Q. And where was Wynne at that time, still on the after deck?

A. Yes, sir.

Q. You say he said several times: "I done it, I done it?"

A. Yes, sir.

Q. The first time you heard it was when you first got down to the room?

A. Yes, sir.

Q. And afterwards when he was standing on the after deck?

A. Yes, sir.

Q. You were pretty excited that night, weren't you, Stable?

A. Yes, sir, I was.

Q. You didn't pay any particular attention to Wynne, did you?

A. No.

Q. Your mind was pretty well directed at McKinnon and the room, was it not?

A. At first; it was at first.

455 Q. What kind of clothes did Wynne have on that evening, do you know?

A. I don't remember.

Q. Did he have a hat or not?

A. He had a cap.

Q. How close did you get to him—to Wynne?

A. Oh, about between 4 and 5 feet, probably.

Q. When he was going off the ship?

A. When he was going—yes, when he was going off the ship.

Q. You didn't go on the after deck when he was standing there, did you?

A. Yes, sir.

Q. Go back to where he was?

A. I went on the after deck to go to McKinnon when he was carried on deck.

Q. And then how close did you pass to Wynne?

A. I can't remember.

Q. Was he standing by the pin rail there?

A. Yes, sir.

Q. Was he leaning on it?

A. He was standing with his back towards it.

Q. Towards the rail?

A. Towards the rail—leaning up against the rail.

Mr. THOMPSON. That's all.

Mr. RAWLINS. That's all.

(Here a recess was taken until 2 p. m.)

## AFTERNOON SESSION.

C. HUZAR, called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. RAWLINS:

Q. What is your full name, please?

A. Christian Huzar.

Q. And what occupation do you follow, Mr. Huzar?

A. I am an engineer.

Q. Marine or—

A. Marine engineer.

Q. What certificate do you hold?

A. What?

Q. Withdraw the question. I will ask you if you know the steamship "Rosecrans?"

A. Yes.

Q. Have you ever been employed on the steamer "Rosecrans?"

A. I have been employed as chief engineer on board there.

Q. Are you chief engineer of that steamer now?

A. No, sir.

Q. During the month of September, 1907, where were you employed?

A. I was chief engineer then.

Q. Who was your third assistant engineer?

A. A man named Bright.

Q. Third assistant?

A. Oh, third assistant? McKinnon.

Q. I will ask you if you know this defendant seated at the left of his attorney here.

A. Yes.

Q. Do you know his name?

A. Wynne.

457 Q. I will ask you if, during the month of September, 1907, he was a member of the crew of the steamship "Rosecrans?"

A. Yes.

Q. In what department was he?

A. In the engineer's department.

Q. And what position did he occupy?

A. He was an oiler.

Q. How long had he been aboard that vessel, Captain?

A. He had been there about two months, maybe, about two, about two trips and a half, about two months.

Q. Do you remember the occasion of this trouble aboard the steamer "Rosecrans" here in the harbor?

A. Yes, I remember it.

Q. Do you remember the date of that event?

A. Yes. I don't know the exact date, the 29th—sometime in September, the latter part.

Q. Now, will you tell us what you first heard of this matter, Captain, the first thing brought to your attention in reference to this trouble aboard the boat?

A. The first I know there was any trouble, I didn't know there was any trouble, I was asleep; I was awakened by some noise and I got up and got on my shoes and went out, and I found Wynne, stood in front of the third assistant's room.

Q. Yes.

A. Well, he said to me then, "I done it;" what it was I didn't know. I looked in and his body stood in a concealed part of the door, and I could see on the floor some blood, and saw part of McKinnon's body and I thought it was something wrong, that he had a fight or something, but as I thought probably the man had a weapon of some kind I made a grab for his hands and caught both his wrists. He said, "I am not going to hurt you." That was all the conversation we had, and I saw the first mate coming across the alley-

458 way, the further end, to go to his room, and I called him, and

I turned him over to the first officer, and I told him I will go for the doctor, because I saw there was a doctor required, but I didn't see or inquire how badly McKinnon was hurt, but from the blood that was around on the floor I thought of going for the doctor. I went on the wharf, to get the phone of the warehouse, but it was locked up.

Q. Now, you were asleep in your room?

A. Yes, sir.

Q. What part of the vessel was your room in, Chief?

A. The second room from the third assistant's room.

Q. I show you a rough sketch of the port side alleyway of the steamer "Rosecrans," and state that where the words "port side alleyway" are written shows the ground plan; this here, marked 1, 2, 3, 4, 5, 6, 7, and 9, show the elevation plan of the side of the rooms; now, this "b" denotes the stern of the ship, and "a" the bow. Will you point out your room there?

A. My room is here, number 7, and then comes the second assistant's room, next to that, and then the third assistant's room.

Q. Number 5?

A. Number 5.

Q. Now, what is the distance from your room to the room of the third assistant engineer?

A. Well, it will be about ten feet, to the middle of the door, I think: yes, ten, or six—about ten feet.

Q. Now, what kind of a noise was this that awakened you?

A. That I couldn't say. I just heard some noise; didn't know what it was.

Q. And did you immediately get up?

A. Well, they was pumping oil at the time, and I thought probably there was something wanted below. I couldn't describe what noise, because I didn't know what noise it was, it just merely waked me, that is all.



459 Q. What was the first thing you did?

A. As usual I put on—always put on my shoes, in case I had to go down below.

Q. And after that what did you do?

A. I went in the alleyway and found this man in from of the door.

Q. What door?

A. Third assistant's door.

Q. Did you address Wynne first, or did Wynne address you first?

A. He addressed me first.

Q. And where were you when he first spoke to you?

A. Right out, probably four feet from him.

Q. And what did he say to you?

A. "I done it," that is all he said.

Q. "I have done it," and after he stated that to you what did you do?

A. Well, I didn't know what it was; I happened to see the blood on the floor in the third assistant's room, through the slit of the door; I could just see part of the floor and part of McKinnon's body lying on the lounge; I thought he probably had a fight or something of that sort, I didn't know what it was; but, as near as I remember, those were the words that passed, except when I took hold, as I said, I thought he probably had some kind of weapon and I had none, and I made a grab for his wrists, so he said, "I am not going to hurt you," and I believe that is all the conversation that passed between us. Then I called the first officer, who was coming across the hatch into the port alleyway.

Q. Now, when you came out into the port alleyway and was four feet from Wynne, and after you took him by the hands, will you state here what his actions and his condition was at that time?

A. It don't seem to be anything wrong with him; he don't seem to be excited at all; he spoke very quietly.

460 Q. Well, from what you saw of him there, Chief, at that time, what can you say as to his being drunk or sober?

A. I should not think he was drunk, because he didn't act so so far as I saw; the conversation that passed between us, I couldn't form much of an opinion, but it don't seem to me he is under the influence of liquor.

Q. When you first saw him, as you approached him, what was he doing?

A. He stood up straight right against the edge of the door.

Q. Where were his arms?

A. Well, when I took his arms they were down, that I remember.

Q. But when he was addressing you, where were his arms?

A. Well, that I couldn't certainly say; he was very quiet, didn't seem to be excited from anything that I saw.

Q. Now how long did you have hold of him before you turned him over to the first officer?

A. I don't think more than half a minute only, from the time the first officer came right along the alleyway, over to the room, that is about, I should judge, probably forty feet, probably not that.

Q. Now after you turned him over to the first officer did you see him again that night?

A. I saw him when I got back with the ambulance from the police station.

Q. Where was Wynne at that time?

A. He was standing on deck.

Q. With whom, if anybody?

A. I don't know exactly who was with him, alongside of him, I couldn't say.

Q. Well, did you get close to him then?

A. Well, within a few feet of him; I never spoke to him.

Q. Were you in a position where you could see him, distinguish him at that time?

461 A. Oh, I could see him, yes.

Q. Was there any conversation; did the defendant say anything at that time?

A. Not that I heard; no, sir.

Q. What can you say as to his actions at that particular time; that is, after you got back with the ambulance?

A. Well, they took him off.

Q. The actions of this defendant?

A. I didn't notice much of his actions then, because they took him, took both of them off. I don't suppose it took more than about two or three minutes before he was off.

Q. Had you seen Wynne during the day?

A. Yes, I saw him during the day; I saw him in the morning when we landed.

Q. Now, after that, did you see him?

A. No, sir, not before; not until I saw him outside the third assistant's room; not to my knowledge.

Q. Did you go into the third assistant's room?

A. No, sir.

Q. Are you familiar with the tool kit aboard the steamship "Rosecrans?"

A. The tools, yes, sir.

Q. I show you that hammer, and ask you if you have ever seen that before?

A. Well, there being so many of them just like that, I could not say; this is a kind of hammer that is used by the thousand, by machinists and engineers, so I could not swear to that.

Q. Are you familiar with the weight of hammers of this nature, of this character?

A. Yes.

Q. I will ask you to take that and tell us what your judgment is as to its weight?

462 A. The weight of it, I should judge that hammer would weigh about two pounds and a half.

Q. Can you state whether or not there was a hammer of a character similar to this one in the tools aboard the "Rosecrans?"

A. Yes.

Q. How long were you in that ship, Chief?

A. I was there from June, two years ago.

Q. Do you know what flag that ship flies?

Mr. THOMPSON. Object to it as immaterial.

The COURT. Overrule the objection.

Mr. THOMPSON. Exception.

Mr. RAWLINS. Q. What flag did she fly?

A. American flag.

Mr. THOMPSON. Move that the answer be stricken out on the same ground.

The COURT. Motion denied.

Mr. THOMPSON. Exception.

Cross-examination by Mr. THOMPSON:

Q. You say you are an engineer; you are chief engineer, are you?

A. Yes.

Q. And I assume you are familiar with the duties of engineers and with all the duties of the engineering department, are you not?

A. Yes.

Q. You say that Mr. Wynne was an oiler?

A. Yes, sir.

Q. What are the duties of an oiler?

A. To oil the engines, also to help carry out the repairs after we get in the harbor.

Q. Do they have regular watches?

A. Yes, sir.

463. Q. Now, where is an oiler, is he below, in the engine room?

A. Yes.

Q. How far down below?

A. Well, sometimes as far down as he can get.

Q. He has to oil all around, has he?

A. Yes, sir.

Q. What is the difference between an oiler and a fireman?

A. Well, the fireman don't do any oiling.

Q. The fireman fires the boilers; is that the idea?

A. Well, they do in coal burners; but in oil burners they act as wipers; do the wiping and help around.

Q. Was the "Rosecrans" an oil burner?

A. Yes, sir.

Q. On an oil burner who attends to the fuel—the oil?

A. The water tender.

Q. Water tender?

A. Yes, sir.

Q. Now, just tell us what the grades are in the engineering department on a ship, beginning at the lowest and going up?

A. Well, the fireman, as we use them, they wipe up the oil or any dirt around there in the engine room or in the fire room.

Q. That is on the "Rosecrans," now?

A. Yes; the "Rosecrans;" that is what I am talking about.

Q. The firemen, you call them?

A. They are called firemen and ship as such.

Q. Then, when a man—after he is through firing what does he do then?

A. Then he goes off his watch.

Q. Well, after he is promoted, how does that promotion go?

A. Well, sometimes they are promoted to oilers and sometimes they come to be water tenders.

464 Q. The basis of it is the firemen, is it; he is the unit from which they start?

A. Yes.

Q. Now, if he is promoted to oiler what does he do?

A. Oil the engines and help on repairs.

Q. All around the engine room; anything he has to do?

A. Yes, sir.

Q. What comes after the oiler—next job?

A. Well, the water tender.

Q. That is a better job than oiler, is it?

A. Well, in some cases.

Q. On the "Rosecrans?"

A. On the "Rosecrans" the water tender is generally the best.

Q. Water tender is a better job than oiler, then; what comes next?

A. Third assistant engineer.

Q. And then right on—second, first, and chief?

A. Right up.

Q. When you went to the room—to McKinnon's room—where was Reed, do you know?

A. Reed; I didn't see him.

Q. How long after you went to McKinnon's room did you see Reed?

A. I didn't see him before I got back with the ambulance.

Q. Didn't see Reed at all until you got back with the ambulance?

A. No, sir.

Q. You don't know where he was?

A. I do not.

Q. Did you see Stahle, the ice man?

A. I didn't see him, either.

Q. When you left who did you leave McKinnon with?

A. With the first officer.

Q. What is his name?

A. Wirschuleit.

465 Q. Where was he when you left there?

A. He came over into the port alleyway.

Q. From the starboard side across the hatch?

A. Yes, sir.

Q. The port alleyway is blind on the port side, and he came across the hatch?

A. Yes, sir.

Q. Did you holler and bring him there?

A. I called him; yes, sir.

Q. There was no one else there but the first officer then when you left?

A. No, sir.

Q. Did you see Reed at all?

A. No, sir; not till I got back.

Q. Did you see Stahle?

A. No, sir.

Q. Didn't see anyone?

A. No.

Q. When you left where was Wynne?

A. I gave him over to the first officer.

Q. What did the first officer do?

A. He held him.

Q. Was he holding him when you left?

A. Yes.

Q. And McKinnon was in the room all alone?

A. Yes.

Q. And there was nobody there?

A. No, sir.

Q. Where was Wynne when you got back?

A. On the after deck.

Q. Who was with him, anybody?

466 A. There was quite a number then.

Q. Were they holding him?

A. I don't think so; I didn't notice anyone; standing there.

Q. Standing around him?

A. Yes; there was quite a number of the ship's crew around him then.

Q. Quite a number of the ship's crew around McKinnon's door?

A. No; that is when he was out on deck.

Q. When you got back they had him out on deck?

A. Yes, sir.

Q. You left him in the room, and when you got back he was out on deck?

A. Yes, sir.

Q. What happened between the time he was left in the room and the time you got back; you don't know?

A. I do not.

Mr. THOMPSON. That is all.

Mr. RAWLINS. That's all.

467 CAPTAIN HOLMES, called as a witness on behalf of plaintiff, being duly sworn, testified as follow:

Direct examination by Mr. RAWLINS.

Q. What is your full name, please?

A. Gustavus S. Holmes.

Q. And what is your business?

A. I am a seafaring man, follow the sea.

Q. And what certificate do you hold, if any?

A. I hold at present a master's license.

Q. Are you master of a ship at the present time?

A. No, sir; I have not been a master since last month, or the beginning of this month.

Q. During the month of September, 1907, what was your occupation, Captain?

A. I was master of the steamer "Rosecrans."

Q. How long had you been master of the steamer "Rosecrans" at that time?

A. I was master on the steamer "Rosecrans" the 5th of June, last year.

Q. When did you first join the steamer "Rosecrans"?

A. On the 20th of August, 1904.

Q. And what was your position aboard of her at that time?

A. Second mate.

Q. And did you continue aboard that vessel until you were promoted to master?

A. With the exception of a few months that I was on the "Porter" of the same company, about six months, I was out of her.

Q. What flag does the steamship "Rosecrans" fly?

Mr. THOMPSON. Object to it as immaterial, and not the best evidence of registration.

The Court. Objection overruled.

468 Mr. THOMPSON. Exception.

Mr. RAWLINS. Q. Answer the question please, what flag does she fly?

A. American flag.

Mr. THOMPSON. Move the answer be stricken out, same grounds.

The Court. Motion denied.

Mr. THOMPSON. Exception.

Mr. RAWLINS. Q. Do you know where she is enrolled?

Mr. THOMPSON. Object to it, as not the best evidence of enrollment.

Mr. RAWLINS. Q. I will ask you where the steamship "Rosecrans" is at the present time?

A. When I left she was in San Francisco Bay, but I heard—

Mr. THOMPSON. Object to that.—

Mr. RAWLINS. Q. When was it you last saw her?

A. Tuesday a week ago, last Tuesday—last Tuesday.

Q. She was still in San Francisco?

A. Yes.

Q. I will ask you if you are familiar with the enrollment papers of the steamship "Rosecrans?"

A. Yes, sir.

Q. And where are they, Captain?

A. They have got to be kept aboard the ship.

Q. I will ask you if you are familiar with the signature of the deputy collector of customs in San Francisco, Farley?

A. Yes; yes, sir, I have seen his signature several times on licenses and so on.

Q. Are you familiar with the seal of the department of customs, in San Francisco?

A. Yes, sir.

Q. Are you familiar with the enrollment papers aboard the steamship "Rosecrans?"

A. Yes, sir.

Mr. THOMPSON. I would like to cross-examine on that.

469 Q. You have seen Mr. Farley write several times; how many times?

A. I have never seen Farley write his signature himself.

Q. Then you don't know anything about his writing from having seen him write?

A. No, sir.

Mr. RAWLINS. Q. You say you are familiar with his signature, Captain; where have you seen his signature?

A. Well, his signature appears in all the licenses aboard the vessel, in the chart rooms and pilot house, all the licenses issued yearly to the ship, and we have occasion lots of times to see them, quite often.

Q. And have you ever received these licenses yourself from the custom-house?

A. Yes, sir.

Q. And when they were handed to you, I will ask you if the signature of Farley appeared on them?

Mr. THOMPSON. Object to that as being a conclusion; the question is whether or not it is the signature of Farley. The way to prove handwriting is by someone who is familiar with the handwriting, who has seen them write. Submit they cannot prove handwriting by hearsay.

The COURT. Q. For how long a time have you been acquainted with the signature?

A. Well, I have seen it appear, as I say, on the licenses on the ship; there is a license issued to the ship to run so long, for one year, and I have seen the signature on that.

Q. Well, you were on the ship as master a short time, and you were on board as second mate for two or three years?

A. I was second mate first, and then I was mate.

Q. Well, during that time as second mate—

A. It was hanging right in the ship's chart room, and there  
470 is where I seen it.



Q. You have seen it from time to time?

A. Yes.

(At the suggestion of counsel, both sides desiring to present authorities on the point raised by Mr. Thompson's objection, and for the reason that to-morrow, Tuesday, November 3rd, will be election day and some of the jurors were inspectors of election, the court excused the jury until Wednesday, November 4th, at 10 o'clock a. m., and stated that it would hear argument by counsel upon the subject under discussion on Tuesday morning, November 3rd. Hereupon court adjourned until November 3rd at 10 o'clock a. m.)

NOVEMBER 3RD, 1908—MORNING SESSION.

(Counsel for both sides argued and presented authorities concerning the point raised by Mr. Thompson's objection, and upon the conclusion of the argument the court stated that it would give a ruling upon the same to-morrow morning. Hereupon court adjourned until November 4th at 10 o'clock a. m.)

NOVEMBER 4TH, 1908—MORNING SESSION.

This cause coming on at this time regularly for continued hearing, and the jury being present, the court made a ruling upon the objection heretofore raised by Mr. Thompson to the attempt of counsel for the United States to prove the signature of Mr. Farley by the witness, Captain Holmes, the matter having been fully argued by counsel for both sides and authorities presented, overruling the objection.

Mr. THOMPSON. We respectfully note an exception.

Whereupon Captain Holmes was called to the stand, for continued direct examination, and the trial of the above entitled cause was proceeded with as follows:

471 Mr. RAWLINS. We offer this in evidence at this time and ask that it be received in evidence. (Showing document containing disputed signature of Farley.)

Mr. THOMPSON. We object on the following grounds: First, that there is no proof that it came from the office of the collector of customs of the district and port of San Francisco, or from any other office which is the legal custodian of the document; second, on the grounds that it does not appear that N. S. Farley is the deputy collector of customs of the port of San Francisco or holds any other official position; third, that the document purporting to be a copy of a certificate of enrollment is not authenticated as required by statute; fourth, that there is no proof that the purported copy is a copy of the document sought to be proven, except that it is marked "Copy" and that it is certified to by N. S. Farley as being a true copy; fifth, that there is no proof that the certificate of enrollment sought to be introduced is at present in force; sixth, on the ground that it affirmatively appears from the purported certificate of enrollment that it has been signed not by N. S. Farley, but by N. S. Farley

through the medium of someone else who initials himself "W;" seventh, that there is no proof that the witness here, who has testified in regard to the signature of N. S. Farley, knows the signature of N. S. Farley, except as it is signed by one who signs himself by the initial "W;" eighth, that there is no proof that the signature N. S. Farley, deputy collector of customs, is in reality the signature of N. S. Farley; ninth, that there is no evidence as to the purported seal on the copy of certificate sought to be introduced being the seal of any department of the Government.

The COURT. This is not purported to be signed by Farley, but by W. J. Coey, acting collector; the certificate is signed by Farley?

Mr. RAWLINS. Yes; the certificate.

The COURT. The objections are overruled.

Mr. THOMPSON. Exception.

472 (Said document was received in evidence and marked "Government's Exhibit 2." Mr. Rawlins here read said document to the jury.)

Mr. THOMPSON. Now, I move to strike out the certificate on the grounds urged in the original objection, and further that it now appears upon the reading of it that it is a purported copy of an original, the absence of which is not explained and not accounted for, and is, therefore, secondary.

The COURT. The motion is denied.

Mr. THOMPSON. Exception.

Mr. RAWLINS (to reporter). Read the last question about the signature.

The REPORTER (reading): "Q. And when they were handed to you, I will ask you if the signature of Farley appeared on them?"

Mr. RAWLINS (to witness). Q. Will you answer that last question, Captain Holmes?

A. Yes; always appeared.

Q. Do you know this defendant?

A. Yes, sir.

Q. How long have you known him, Captain?

A. I couldn't exactly tell you the date; I have only known him since the time he came on the ship until he left.

Q. Did you know a man by the name of Archibald F. McKinnon?

A. Yes, sir.

Q. Was he a member of the crew of the steamship "Rosecrans?"

A. Yes, sir.

Q. What department was he in aboard that vessel?

A. The engineer's department.

Q. Do you know what rating he had there?

A. Third assistant engineer.

Q. Now, this defendant, Wynne, what department was he in?

A. Also in the engineer's department.

Q. And do you know what his rating was?

473 A. Oiler.

Q. You have testified here in reference to Wynne's leaving the ship; do you remember that date?

A. Yes, sir.

Q. When was it, Captain?

A. That was on the 20th of September.

Q. What year?

A. 1907.

Q. When did the "Rosecrans" arrive in Honolulu in September?

A. I couldn't say if it was the 18th or 19th; I don't remember now.

Q. And at that time was this defendant and McKinnon both members of the crew of that vessel?

A. Yes, sir.

Q. On the night of the 20th of September, 1907, where were you?

A. Well, I was on shore and on board the ship.

Q. What time did you go ashore, Captain?

A. Well, I had been ashore off and on during the day, attending to business of the ship and so forth. In the evening I went up town, but I don't remember the exact time.

Q. Do you remember what time you got back to the ship?

A. Not to the exact hour; no.

Q. When you got back to the ship did you see this defendant or McKinnon?

A. No, sir.

Q. During that night, Captain, did you see this defendant after you had returned to the ship?

A. I did see him afterwards; yes.

Q. Will you kindly relate the circumstances connected with your seeing him?

A. Well, I saw him come out of the port alley way in the hands of the first officer; he was handed over to me and I took hold of him there, and stopped and talked to him.

474 Q. Well, prior to your seeing him come out of the port alleyway, where were you?

A. I was in my room; in bed.

Q. And how did you happen to be at the port alleyway at this particular time?

A. I was called out of bed by one of the quartermasters.

Q. And after you were called out of bed where did you go?

A. I went right out on deck and saw the man coming out of the port alleyway.

Q. What part of the ship was your room in?

A. After part of the ship.

Q. You say that you saw him in charge of the first officer, and he was turned over to you?

A. Yes.

Q. What, if anything, was it the defendant said to you?

A. Sir?

Q. Was anything—what, if anything, was it that the defendant said to you when you had charge of him?

A. Well, he said that he done it; and he told me he had nothing against me; but he had done this man, and I don't exactly remember the words, because I never got them on my mind to remember them.

Q. Kindly relate as much as you can of what took place, as near as you can remember it?

A. Wel, when I got out there he tapped me on the shoulder and said he had nothing against me—didn't mean to do me any harm; he had done the third assistant and he was glad he done it—something of that kind; and he said a whole lot more things that I didn't put in my memory—never noticed—because I was too much filled up by thinking to do something for the man that had been hurt.

Q. Do you know Captain Charley Madeson?

A. Captain Madeson; yes, sir.

Q. Charley Madeson?

475 A. I couldn't tell you whether his name is Charley; I know his initial is C. Madeson.

Q. I will ask you if you saw him on the night of the 20th of September?

A. Yes, sir; I sent for him when I came on deck. I shouted for him. He was lying alongside of us, on the ship "Marion Chilcoat," and he being an older man, I told myself he might be able to give me some assistance with the man that was hurt. I called him over.

Q. When he got over there where was Wynne, do you know?

A. He was on the after deck.

Q. How long did you have charge of Wynne?

A. Oh, a few minutes. I told the first officer to go and get handcuffs and put on the man, and in the meantime I went into the room to look after the man that was hurt.

Q. What was done with Wynne then?

A. The first officer was standing by him at that time.

Q. And after that who had charge of him?

A. Captain Madeson had charge of him.

Q. Did you see Captain Madeson in charge of him?

A. Yes; I was there at the time Captain Madeson was standing alongside of the rail.

Q. What were Wynne's actions on that occasion?

A. Well, he didn't appear to act very strange to me.

Q. What can you say as to his condition of sobriety? State whether he was drunk or sober.

A. It is a hard thing for me to tell. I could smell on his breath that he had been drinking, but whether the man was sober or drunk I could not say—something I couldn't tell.

Q. Did you see McKinnon at that time?

A. Yes, sir.

Q. Where was he when you first saw him?

A. On the settee in his room.

476 Q. And what did you observe, if anything, in the room there?

A. I observed that the man was badly hurt, the blood flowing out of his temple and over the ceiling and walls of the room.

Q. Yes?

A. And an awful lot of blood on the floor, and his lower lip was hanging away down this way.

Q. Was there anything else you saw in the room there?

A. When I looked in there Captain Madeson and our second officer was in there, and we had one of the quartermasters carrying water in there. He was in there from time to time.

Q. Do you know the name of the quartermaster?

A. Yes, sir; Visser.

Q. Now, was there anything else that you observed in the room there?

A. Well, I saw—this quartermaster showed me a hammer.

Q. What kind of a hammer was that?

A. What we term a machinist's hammer—half round on one side.

Q. After the hammer was shown to you, what was done with it?

A. It was left in the room and I—after the man was turned over to the police, a policeman went into the room and took charge of the hammer.

Q. Look at that hammer. [Showing Exhibit 1.]

A. That looks very much like it, but I could not swear to it that it is the same one, because there are so many hammers all looking alike. It is a hammer looking exactly like that one.

Q. You say the hammer was turned over to the police officer?

A. Yes, sir; he took it.

Q. And how long after you first saw McKinnon was it that this police officer took that hammer?

A. Might have been about ten or fifteen minutes.

Q. State whether or not he left the ship with it, if you know.

A. He left the ship; yes, sir.

477 Q. Now, will you describe with a little more detail, Captain, the condition of McKinnon's room on that occasion when you looked into it?

A. Well, everything was the same as it always is, the bed was made up and everything in the room was in its place; there is very little in these rooms at any time. The man was lying on the settee. That was all the conditions of the room that I could see. At the time I was looking in there there was two men working on McKinnon, and I couldn't see anything wrong with the room; I noticed that the bed was made up and had not been slept in.

Q. How many doors are there into that room, the room the third assistant occupied?

A. One door.

Q. And how many berths in the room?

A. There is one bed, and then there is a sleeping lounge, or settee.

Q. Now, how is that berth, sleeping bed or berth, built?

A. The bunk is facing the door as you open the door and the settee is on the side.

Q. Does the bunk run lengthways?

A. Fore and aft, yes.

Q. And what position is the settee?

A. Athwartships, across the vessel.

Q. Now, in reference to the door that went into the third assistant's room, where was the settee?

A. Just inside the door, on the right-hand side as you looked into the room.

Q. What was the distance from the door to the settee?

A. Why, the outer edge of the settee was flush with the door, almost within an inch or two, a few inches.

Q. Now, as you looked in there, in reference to the door, where was McKinnon's head?

478 A. Right on the settee, towards the door.

Q. Now, you have testified here in reference to blood in that room. Will you describe where this blood was, with some more detail, in what part of the room?

A. Well, blood was on the top of the ceiling, and on the after bulkhead of the room, and some spatters on the side bulkhead, and some on the floor, and the most of it was on the floor.

Q. Now, this settee was against what bulkhead, was it the after or the forward bulkhead?

A. The forward bulkhead.

Q. Now, in reference to the settee, where were any blood spots, if any?

A. That I didn't notice, if there was any on the settee.

Q. Well, on the bulkhead near the settee, what about blood spots?

A. I didn't notice there.

Q. After this first conversation which you had with this defendant, when you met him outside the alleyway, did you have occasion to talk to him again?

A. Well, no; I spoke to him, asked him why he done it, that is all the talk I had with him.

Q. Now, when you asked him that was anything said by the defendant?

A. Well, I couldn't repeat the exact words that he said now, because it is so long ago, but he was referring to something that the third assistant had tried to have him fired off the ship, or something, and he also talked about working together with dagoes. I did not put that on my mind, what he said, and couldn't repeat the exact words.

Q. During the day, Captain, did you see Wynne?

A. I don't remember seeing him during the day; no, sir. I may possibly have seen him and not put it on my mind.

Q. You say you have been on the "Rosecrans" since August, 1904?

A. Yes, sir; 20th day of August, 1904.

479 Q. Who is or who are the owners of the steamship "Rosecrans"?

Mr. THOMPSON. Objected to; the best evidence of the ownership is the title. There must be a bill of sale or something to show the ownership; if there is, he certainly can't testify to it.

The COURT. Don't the enrollment show it?

Mr. RAWLINS. Yes; but you may show by reputation who the owner is.

Mr. THOMPSON. Then if it is merely cumulative it is immaterial, in addition to the other objection. If the enrollment is sufficient it is immaterial; if it is sufficient then the testimony is incompetent. (Argues.)

Mr. RAWLINS argues.

The COURT. This is not a contest for the title of the ship, and I will overrule the objection, seeing that this man is an employee and has long been an employee of the vessel.

Mr. THOMPSON. Exception.

A. Well, all I go by is the ship's papers—National Oil and Transportation Company.

Mr. THOMPSON. Move it be stricken out now, it being clearly hearsay. Out of his own mouth he has shown he is incompetent to answer it, because he goes right back to the enrollment.

Mr. Rawlins argues.

The COURT. It is of no additional value; as evidence it don't add anything. I will allow the motion.

Mr. THOMPSON. May the jury be instructed to disregard it?

The COURT. Yes; that answer is out of the case.

Mr. RAWLINS. Q. What is the reputation relative, if you know, relative to the nature of this National Oil and Transportation Company being a corporation or a copartnership, and where organized?

Mr. THOMPSON. Objected to as immaterial.

The COURT. I ruled that the issue here was not the ownership of the vessel, but was something very different. It is a collateral matter of very little importance.

480 Mr. THOMPSON. Object to it on the same grounds that Mr. Rawlins objected to my question on.

The COURT. The question is, having been alleged, whether it must be proved.

Mr. Rawlins argues.

The COURT. I will sustain the objection.

Mr. RAWLINS. If the court please, on that matter of proof of reputation, we have here a case which, with the permission of the court, we would like to cite.

The COURT. You mean you would like to reopen the question?

Mr. RAWLINS. Yes; with the court's permission.

Mr. THOMPSON. No objection.

The COURT. Then you may do so.

(Mr. Whitney and Mr. Rawlins here argued and cited cases, and Mr. Thompson argued in reply.)

The COURT. I don't care to rule on the question of immateriality. My impression is that this is immaterial, but I don't rule on that, and



therefore I think I will admit this testimony, for I presume that is the law. It is merely the de facto status of the corporation, and whatever the question may be as to its immateriality, I will not rule directly on this point at this time.

Mr. THOMPSON. Except to your honor's ruling first, and ask that I may be allowed to cross-examine the witness to see what he knows about general reputation.

The COURT. That is allowed.

Mr. THOMPSON. Q. When you first went to work on the "Rosecrans" who owned her?

Mr. RAWLINS. Object to that; he has not stated here that he knows what the general reputation is.

Mr. THOMPSON. Then he cannot answer that at all.

The COURT. Ask him the question as to the general reputation.

(Reporter reads question, amended by inserting the word  
481 "general" as follows:)

"Q. What is the general reputation relative, if you know, relative to the nature of this National Oil and Transportation Company being a corporation or a copartnership, and where organized?"

The WITNESS. A. That is all I know, by hearsay. I don't know the inside of any of this business at all, more than running the ship.

The COURT. Q. What do you mean by hearsay, in reference to the documents?

A. No, in reference to the reputation, whether it is organized in California or not. I know it is organized in California as far as that document says so; that is why I know it, by the document, but I have no further proof than the document.

Mr. RAWLINS. Q. All you know it from is from what you see in that paper?

A. Yes.

Mr. THOMPSON. Move that the answer be stricken out, that he knows the general reputation.

The COURT. Motion allowed.

By Mr. RAWLINS. Q. At the time that these occurrences happened aboard the "Rosecrans," I will ask you whether she was afloat or not?

A. She was afloat; yes, sir.

Q. At what place?

A. Down in this harbor.

Q. What harbor do you mean?

A. Honolulu Harbor.

Q. Honolulu Harbor?

A. Yes, sir.

Q. What was her position at the dock, Captain?

A. Lying port side to the dock.

Q. Was she up against the dock or away from it?

A. Fast to the dock; yes, sir.

The COURT. The question is whether she was close to the dock or away from it?

482 A. Well, the orders is to have the ship rest about six feet from the dock, which she was.

Q. Had those orders been carried out on this occasion?

A. No doubt they had; if she had been slackened in during the evening I didn't notice it.

Mr. RAWLINS. Q. Your answer is that, as to whether or not she had been drawn in to the wharf during the evening, you don't know?

A. No. We had lines on the other side of the dock, and they may have been slackened in, to get her a little closer; the ropes is getting kind of short, and at times we have to slack her in; which I didn't notice.

Q. When this defendant was taken from the steamship "Rosecrans," do you know where he was taken to?

A. I saw him go up the dock in the hands of a policeman.

Q. Where was this dock located, what place?

A. In Honolulu; #2 railroad wharf.

Q. In the island of Oahu, Territory of Hawaii?

A. Yes, sir.

Cross-examination by Mr. THOMPSON:

Q. She was lying in the railroad wharf slip, was she?

A. Alongside of the railroad wharf #2.

Q. Was she—how far up from the end of the slip, Waikiki end of the slip, was she?

A. Not more than probably ten feet—the masts were nearly—the upper berth, and got to go as far as the water allowed us.

Q. About ten feet from the end of the bulkhead?

A. Yes.

Q. How long is that slip, do you know?

A. I don't know.

Q. How long is your ship?

A. 327 feet, I believe.

483 Q. Well, we can get it from here; and she was within about ten feet of the upper bulkhead, was she?

A. Her bow was about that far.

Q. Well, then, how much distance was there astern from the stern of the ship to the end of the dock?

A. I couldn't tell you; haven't got an idea.

Q. Well, was she fifty feet?

A. Oh, yes; over three hundred feet.

Q. Then on this side is the railroad warehouse; this is on the sea side; am I right? (Showing.)

A. On the sea side is the sugar houses of the O. R. & L. Not on the same dock as we were lying.

Q. You were lying on the side towards the sea, were you not?

A. On this side.

Q. On the side towards the mountains, of the slip, were you?

A. Yes, sir.

Q. And you were attached to the dock by a hose, were you not?

A. By a rope; a hose also.

Q. The hose was the means by which you were handling the oil?

A. Yes.

Q. And you mean the hull of the ship was about six feet away from the dock itself, but she was attached to the dock by a hose; am I right?

A. Yes, sir; and of course tied up with lines, of course.

Q. You know nothing about the harbor lines in Honolulu, do you?

A. What do you mean by harbor lines?

Q. The harbor lines as laid out by the United States Government.

A. All I know is the chart, to come in and out of the place.

Q. But when you said she was in the harbor of Honolulu, you don't attempt to testify that she was within the prescribed harbor lines as laid out by the United States Government?

A. That is something I don't know.

484 Q. Then, as a matter of fact, she was in the slip which leads into the main harbor of Honolulu; is that what you mean?

A. She is in what I called the harbor of Honolulu; I don't know about slips.

Q. Was she in a slip or wasn't she?

A. Inside the dock.

Q. Was she in a slip?

A. No slip there; a dock on one side and a dock on the other.

Q. What is a slip?

A. A slip is a lot of different things—a ferry slip.

Q. What is a ferry slip?

A. A place where you have just room enough for that special vessel to get in.

Q. Then, if there is room for more than one vessel it is not a slip?

A. Well, it could be termed a slip; I have heard that several times, but I don't know why this is done.

Q. Now, you told us of a ferry slip, with just room for one boat. Tell us of another kind of slip.

A. Another would be between two wharves.

Q. Two wharves with a bulkhead at one end, would that be a slip?

A. It would.

Q. Where you were lying were you between two wharves?

A. Yes.

Q. With a bulkhead at one end?

A. No bulkhead except the ground.

Q. Which would take the place of a bulkhead, would it not?

A. Yes.

Q. Would you call that a slip?

A. Well, it may be termed a slip, that is something—there is lots of different opinion in that regard.

Q. All right; now I don't want to fence with you; you know the center part of the harbor which is not cut in, do you not?

485 A. Yes.

Q. Did this hole, surrounded by docks on two sides and with a bulkhead of mud at the other end, form a part of the big circle, or was it off from it?

A. It was off from it.

Q. Is it what you have heard termed a slip?

A. Well, at times I have heard it termed a slip, and at other times not.

Q. What other nautical terms?

A. So far as I am concerned we call it a dock.

Q. Isn't the dock the wooden portion of it?

A. Yes.

Q. Then what is the water in between?

A. Well, I couldn't tell that; as I say, it would be a slip in the case of a ferry, with room for one ship.

Q. And if room for more than one ship, would it still be a slip?

A. Possibly. I have never got down to technicalities.

Q. It is a dock, then, is it?

A. It is a dock, yes.

Q. The water is a dock?

A. The water is floating underneath it.

Q. But the part that is in between the two docks and the bulkhead, is there any term for that?

A. Well, that can be termed a slip.

Q. You said that you may have seen Wynne on that day or may not have, on September 20th. You have no independent recollection of seeing him, have you, other than you have testified?

A. No, sir.

Q. I take it in your business you didn't pay very much attention to the engineer's department?

A. I did not.

Q. You didn't observe Wynne particularly, did you?

A. No, sir.

486 Q. From what you saw of him, he moved around like the rest on the ship, did he?

A. Yes, sir.

Q. Seemed to move around quietly, and you never had anything particular to do with him, did you?

A. No.

Q. I am going to examine you a little bit, Captain, on this signature of Farley. You have testified that at the various times certificates of enrollment came aboard that they had this signature?

A. Yes, sir.

Q. How many certificates have you seen come aboard?

A. There is only one certificate issued. The licenses I see come aboard every year, license of inspection, and it is hanging up in the chart room, because every year it comes and stays there until she expires.

Q. As a matter of fact, you have never seen a certificate of enrollment come aboard the ship; it was there when you came there?

A. It was.

Q. And the certificate of enrollment which you did see—did you ever see the certificate of enrollment, after you came aboard?

A. Yes, sir.

Q. And did you notice the signature on it?

A. Yes, sir.

Q. And the signature was——

A. N. S. Farley.

Q. Was it signed N. S. Farley with a "W" on the bottom of it, like that?

A. No, I never seen that before.

Q. Then, as a matter of fact this signature here with the "W" on the bottom you never saw?

A. I know the particular turn of the "y."

Q. You have never seen it before?

487 A. I have seen it before, but never noticed it on any signatures on other papers.

Q. So far as that particular part in concerned, you are not familiar with it?

A. No, sir.

Q. These licenses that came aboard, how many of them have you seen?

A. Well, I have seen one in my own experience.

Q. Only one?

A. Yes.

Q. Then the extent of your familiarity with Farley's—did that one have this "W" on the bottom of it?

A. I never noticed it; never looked close enough for that.

Q. Then, as a matter of fact, you never looked very close at Farley's signature?

A. Not close enough to make any impression about it; all I know is this is Farley, and it is so conspicuous——

Q. The extent of your knowledge of Farley's signature, as I take it, is that you have seen the certificate of enrollment which was there when you came there?

A. Yes.

Q. It was framed, was it?

A. No, sir; this certificate of enrollment was not. The license of inspection was framed.

Q. And you have seen one license of inspection come aboard?

A. Yes; that is, to myself; but I had seen previous to that several of them during the four years I had been there; they have got to be hanging in the ship's chart room.

Q. And you have seen only one come aboard?

A. Yes, sir.

Q. And they were all signed by Farley, but you had never noticed the "W" on the end of the "Y?"

A. No.

Mr. THOMPSON. That's all.

488 By a JUROR (Mr. Lucas). Q. Captain, when you arrived in port at San Francisco there, did you have to deposit your papers in the custom-house?

A. Which papers—the manifest or ship's papers?

Q. Ship's papers.

A. No, sir; only the manifest from the place which you sail from, in a home port; in a foreign port you have to do that.

Q. Do you consider Honolulu a home port?

A. Yes, sir; that is an American port.

Q. Then, the custom-house has no jurisdiction over your papers in a home port?

A. Oh, yes; we had a temporary license issued here this year; only temporary, though; we had to get our regular license from the place where the ship is registered.

Q. Well, do the custom-house have control of the wharves at all?

A. Down here?

Q. Yes.

A. Well, I guess so; they have control of this part of the place; yes.

Redirect examination by Mr. RAWLINS:

Q. Now, this body of water where the "Rosecrans" was resting, between these two docks, with a mud bank at one end, after you came into the channel into Honolulu Harbor, did you have to come overland to get to this place, or how did you get there?

A. Through the harbor right in there; didn't go overland there.

Q. From the open sea?

A. From the open sea.

Q. It is connected with the main harbor; from the open sea you enter right into that place, did you, in the same navigable water?

A. Yes.

By a JUROR (Mr. Bergau). Q. Captain, at the time you took that hammer in the third engineer's cabin in your hand, did  
489 you notice any blood on that hammer?

A. I don't think I took it in my hand; I didn't say so.

Q. You didn't look at it closely?

A. Yes, I looked at it when handed to me by the quartermaster, and I then noticed blood on it.

Mr. RAWLINS. That's all.

Mr. THOMPSON. That's all.

(Here an adjournment was taken and the hearing of this cause was continued until November 5th, 1908, at 10 o'clock a. m.)

NOVEMBER 5, 1908—MORNING SESSION.

(This cause came on regularly for continued hearing and, the jury being found to be all present, the following proceedings were had:)

Mr. RAWLINS. After consultation with my associate, Mr. Breckons, at this time we rest, subject to any rebuttal that we may have to offer later.

490 J. J. McDONALD, called as a witness on behalf of defendant, being duly sworn, testified as follows:

Direct examination by Mr. THOMPSON:

Q. Your full name, please, Mr. McDonald?

A. James Joseph McDonald.

Q. And you are the J. J. McDonald on the list of witnesses for the United States Government, are you?

Mr. RAWLINS. Object to that as calling for a conclusion. If he has been subpoenaed the subpoena is the best evidence. It is immaterial whether he is on the list of witnesses or not.

The COURT. Overrule the objection.

A. I was on that jury; I suppose I am the man that was named in the summons.

The COURT. Q. On what; on the coroner's jury?

Mr. RAWLINS. Move to strike out the answer as not responsive.

The COURT. Allow the motion.

Mr. THOMPSON. Q. The question is whether you were on the list of witnesses of the United States Government?

A. I am.

Q. You just stated that you were on the coroner's jury?

A. Yes.

Q. What jury do you refer to?

A. A coroner's jury impaneled to inquire into the cause of death of one McKinnon.

Q. At that time state whether or not you saw this defendant.

A. Yes, I did.

Q. Give us just what happened at that coroner's jury, Mr. McDonald, in your own language.

A. Well, I would have to do it from memory, because it is a long time ago.

Q. I appreciate that fact.

491 A. Do you want me to begin at the beginning?

Q. Begin when the defendant came in, if you remember.

A. Well, the defendant was brought in before the jury, and Mr. Whitney made a statement to him, something in these words, that he might make a statement if he wished to, and he sat down on a chair.

Q. Who? Wynne, the defendant?

A. The defendant sat on a chair and Whitney sat down on a chair, facing in front of him, and Whitney commenced to ask him questions. He answered all those questions very readily, without any hesitation. He told of being drinking a great deal, if my memory serves me; he had drunk in the forenoon, and then in the afternoon or evening he had drunk a great deal. He said he had taken a great many beers. He tried to describe the place where he had taken them



as a place where there was more than one saloon; or, in other words, saloons on several corners, but couldn't tell just what particular part of the town it was in. He didn't locate it, he could not locate the exact place, and then Mr. Whitney asked him why he struck McKinnon, or something of that kind, and he said he didn't know, my memory is, he didn't know why in the world, he didn't know what made him do it. He had a cap and he was twirling it in his hands. He was sitting quiet, back to where I was sitting. The jury were in a kind of semicircle and he was twirling this cap. He then asked him where he got the hammer from, and he said he didn't know. That is the gist of his answer. I have forgotten the exact words, but he didn't know where he got it from. Then he stood up—oh, no, then I asked him—I wanted to get a look at the man's face, and I couldn't see it from where I was sitting—and I asked him what country he came from, and he turned that way and said he came from Ireland. I asked him what part of Ireland, and he said from Cork. Then he stood up and he asked Mr. Whitney if he would mind telling him how McKinnon was getting along; that was his question.

492 Q. How did he look when he said that? Describe his general appearance, Mr. McDonald.

A. Well, his head was hanging down. He looked like a man that was—well, I should say he was a very much unstrung man. That was my judgment of the matter; his head was hanging down, twirling his cap still, with his back to me. That was all that was said that I remember.

Q. Unstrung—can you tell—if you can't, of course you won't—can you give any reason for why, in your judgment, he was unstrung?

Mr. RAWLINS. Objected to as incompetent, irrelevant, and immaterial, and calling for the conclusion of this witness.

The COURT. It seems to me that is asking for his conclusion. I suppose he might be asked, if his experience could go so far, if he could judge from his appearance as to the causes of his condition.

Mr. THOMPSON. Withdraw the question. Q. Mr. McDonald, can you say, from your experience in observing men, the causes or cause of his mental condition?

A. Well, the man said that he had been drinking.

Mr. RAWLINS. He is not answering the question. Object to that.

The COURT. Let's hear his whole answer. I will allow the answer to be finished.

(Last question read to witness by reporter.)

A. Well, I couldn't make that positive, but I had a reason for thinking so, but couldn't say positively.

Q. Well, give us your judgment on it; that is what I asked for.

Mr. RAWLINS. Submit the answer is not responsive to the question. Move to strike it out. That calls for an answer yes or no.

The COURT. Well, probably he can't help it. In his mind the evidence he has heard as to his having been drinking the day before is still there. This question is, if you can clear your mind of that.

if you can judge from your own experience in seeing men in similar states of an unstrung condition, whether, judging from your past experience or observation of men in like condition, and perhaps knowing what produced it, can you say or have you an opinion as to what the causes were of this unstrung condition?

A. Yes.

Mr. RAWLINS. May I cross-examine him at this point?

Mr. THOMPSON. There is no occasion for this.

Mr. RAWLINS. It is as to his ability to give this opinion.

Mr. THOMPSON. He is not testifying as an expert, but as to what is the common knowledge of all. (Argues.)

The COURT. I don't think it is one of those questions in which he is testifying as an expert. Your cross-examination, when the time comes, will test this as to the reliability of his impression.

Mr. THOMPSON. Q. Now, Mr. McDonald, will you answer the question?

The COURT. He has answered the question. He said yes, he had an impression.

Mr. THOMPSON. Q. What is it, Mr. McDonald?

A. My impression was he was in the aftermath of a bad drunk; suffering from the aftermath of a big drunk.

Cross-examination by Mr. RAWLINS:

Q. You have related substantially, have you, Mr. McDonald, all that this defendant said on this occasion?

A. As I told the jury, so far as my memory will carry me back; I don't remember perhaps one-eighth of what was said there.

Q. Do you remember him testifying as follows (reading from document): "I don't remember." The question was "What was the first saloon you went to?" Do you remember that question being put to him?

A. I do not.

Q. Do you remember this answer to the question: "I don't remember; I had been there in the morning about an hour after the ship docked and mailed some letters. I thought I would not have to go on watch until 1.00 o'clock, and I went ashore." Do you remember that?

A. Yes; I stated I do remember his stating he drank in the morning.

Q. Do you remember that answer?

A. No; I do not.

Q. (Reading:) "During the hour I was away I had four or five beers, but of course I was sober then, when I went back to work." Do you remember him stating that?

A. No; I can't remember that answer, nor the question.

Q. Do you remember him testifying at that time that George Nixon and McDonald and himself—(reading): "George Nixon and McDonald and myself were together all the afternoon. Then we fell in with another fellow off our boat. That night we were sitting at

a table talking, and the first assistant came along and began to abuse me for not attending to my work in the morning. I explained the case to him. I know the other man had been stuffing him against me. The other man was sore on me for no reason at all."

A. Yes; I remember that, since you read it.

Q. And do you remember this question being put to him: "When was this?" and his answer being "That was last night, late?"

A. No, I don't remember that answer; not in that way.

Q. Do you remember this question being put to him (reading): "How have you been figuring you hit the man?"

A. I don't remember it in that way; but I remember a question equivalent to it.

Q. Do you remember this answer being given (reading): "I knew I done it, but I couldn't tell you why. I knew I had a grievance, but don't realize doing the work?"

A. I remember he said he done it, but just what words he  
495 used in saying it—

Q. Do you remember testimony to that effect?

A. I remember his making the admission that he struck McKinnon, but just what verbiage he used in saying it has slipped my mind.

Q. You say his answers were without hesitation and promptly made?

A. They were.

Q. And so far as you could see, Mr. McDonald, the answers were responsive to the questions put to him, were they?

A. They did appear very much so.

Q. Now you said that he appeared to you like an unstrung man?

A. Yes, I did.

Q. Has your experience been that a man may become unstrung only after a big drunk?

A. No. I have seen men in a very nervous condition from many causes.

Q. Can you name some of them, Mr. McDonald?

A. Well, a man gets a heavy fall, and when the reaction sets in on the man he is in a very nervous condition, what I would call, perhaps it is not very classical language, unstrung. If a woman, I would say it was nervousness; if a man, unstrung.

Q. Did you every see a person become unstrung after detailing the events of a tragedy?

A. I never did. This is the first tragedy I ever heard a man detail.

Q. And you are not competent to say whether this unstrung condition of Wynne was from relating the tragedy that occurred that night or whether it was from drunkenness, are you?

A. Well, I am not much on answering these questions legally; I don't know how. I have never been on a witness stand before. I could answer that question.

Q. And what is your answer, Mr. McDonald?

A. My answer would be that if it was in my case I wouldn't  
496 have had any nerves at all.

Q. After telling that story?

A. After telling that story on myself.

Q. So you are not prepared to say that this condition was dependant solely upon the fact that that man had been drinking the night before?

A. Well, that is the cause that I attached to it at that time, gentlemen.

Q. Well, are you willing to swear at this time, from what you saw there, that his unstrung condition was dependant upon that only, and not upon the fact that he related some of the events of the night before?

A. No, I am not.

Q. So you are undecided in your own mind as to what caused this appearance of this man at that time, whether it was from drunkenness or telling this story?

A. I am not answering it positively I am simply giving it as my opinion. I want to be careful under oath, don't want to make any blunders; I want to tell the exact truth, nothing but that.

Q. You have stated that if it was in your case, after telling the story he told, that night, you would have no nerves left?

A. Yes, I so stated.

Q. Isn't it also your opinion that this man, after telling that story that night, was unstrung from that?

A. I do not know.

Q. Not knowing that, then you don't know, I take it, whether it was on account of his being drunk the night before, as he claimed?

A. Well, after sitting there and listening to the drinking bout that he was through, it would be but natural that a man would attribute it to the drinking.

Q. Well, wasn't it just as natural for you to attribute it to the fact that he had just got through relating the details of these events; that didn't appeal to you at that time?

A. It didn't appeal to me at that time.

497 Q. Well, does it appeal to you now?

A. Well, I have answered that question. I am not an expert; if it was my case I would have been wrought up, nervous, broken up and nervous; now, as to giving an opinion about the matter, I am not capable of doing that.

Q. Well, you don't want—do I take it you don't want this jury to believe your statement here, that he was unstrung, came from the fact that he had been drinking the night before?

A. I want this jury to believe every word I say, because I am stating it under oath, and I expect this jury to fairly and plainly accept every answer that I give, every one. I want them to believe anything and everything that I will answer; yes, sir. I will answer you in my best way if you put your question plainly; I will try to answer them, but you are giving me questions it would take a professor to answer.

Q. I just want to get to the bottom of this proposition, that is all. You stated here that he had the appearance of an unstrung man,

and then, afterwards, in answer to a question put by Mr. Thompson, you said this: "My impression was he was suffering from the aftermath of a big drunk."

A. That was my impression.

Q. Now, you have also stated here, Mr. McDonald, that if it was in your case, after relating the circumstances of the affair the same as this man did, you would have no nerves at all.

A. I believe the jurors believe me there.

Q. Now, so you recognize the fact, do you, that a man may become unstrung not only from the effects of a big drunk, but from the relating of the events connected with a tragedy?

A. Well, certainly.

Q. Well, so this condition of this man, which appealed to you that night might have resulted from either one of two causes, either  
498 that of his having been drunk, or from the fact that he had related the events connected with the tragedy; which one you are not able to say?

A. Yes; that is a fact.

Q. You say, Mr. McDonald, that he inquired of Whitney how McKinnon was. He mentioned McKinnon's name, did he?

A. As I understood the question, he asked Mr. Whitney if he would mind—this is only from memory—if he would mind telling him how McKinnon was getting on. Those are the words as near as I can remember.

Redirect examination by Mr. THOMPSON:

Q. You said, Mr. McDonald, you couldn't tell which, at this time it was, whether he was suffering from the aftermath of a big drunk, or from nervousness attendant upon the recital of the details of a tragedy?

A. Yes.

Q. Your impression at that time, however, was what, Mr. McDonald?

Mr. RAWLINS. Objected to as improper redirect examination.

The COURT. He has held on to his testimony that at that time his impression was that the cause was the drink. He has not changed that.

Mr. THOMPSON. I will withdraw the question. That's all.

Mr. RAWLINS. That's all.

Mr. THOMPSON. We close.

Mr. RAWLINS. No rebuttal.

(This closed the testimony in the above-entitled cause.)

I hereby certify that the foregoing transcript of testimony, consisting of two hundred and forty-three (243) typewritten pages, is a full, true, and accurate transcript of my shorthand notes of the testimony taken and proceedings had upon the trial of the case of the United States of America vs. John Wynne, upon the days and

at the times in said transcript mentioned, and, as such, is entitled to faith and credence.

A. A. DEAS, *Reporter.*

500 The foregoing bill of exceptions of defendant, John Wynne, is correct in all respects, and is hereby approved, allowed, and settled and made a part of the record in the above-entitled cause, and I hereby certify that by order made herein on the 8th day of January, A. D. 1909, it was "ordered, that the said defendant have sixty (60) days from the expiration of the \* \* \* October, 1908, term of the above-entitled court within which to prepare and file a bill of exceptions herein," and I hereby further certify that said term expired on Tuesday, the 26th day of January, A. D. 1909, with the adjournment of court on said 26th day of January, A. D. 1909.

Done at Honolulu, this 23rd day of March, A. D. 1909.

SANFORD B. DOLE,

*Judge of the United States District Court  
for the Territory of Hawaii.*

500½ (Indorsed:) 81. 366. United States District Court, Territory of Hawaii. United States of America, plaintiff, vs. John Wynne, defendant. Defendant's bill of exceptions. Filed March 23, 1909. A. E. Murphy, clerk. By A. A. Deas, deputy clerk.

501 In the United States District Court for the Territory of Hawaii.

JOHN WYNNE, PLAINTIFF IN ERROR,  
*versus*

THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR. }

*Petition for writ of error and supersedeas.*

And now comes John Wynne, plaintiff in error in the above-entitled cause, said cause being originally entitled in said court, "The United States of America, plaintiff, vs. John Wynne, defendant, No. 366," wherein he, the said John Wynne, plaintiff in error herein, was defendant, and the said John Wynne says:

That on or about the 9th day of November, A. D. 1908, the jury in the said cause returned a verdict in favor of the plaintiff, the United States of America, defendant in error herein, and thereafter, on or about the 13th day of November, 1908, the said court entered a judgment and sentence herein in favor of said United States of America, and against the said John Wynne, in which verdict and judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of the said defendant, John Wynne, plaintiff in error herein, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff in error prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States, and that all further proceedings in this United States District Court for the Territory of Hawaii be suspended and stayed until the determination of said writ of error by the United States Supreme Court.

(Sgd.)

JOHN WYNNE,

*Plaintiff in Error.*

THOMPSON & CLEMONS,

(Sgd.)

*Attorneys for Plaintiff in Error.*

Due service of the foregoing petition for writ of error and receipt of a copy thereof are hereby admitted this 23rd day of March, A. D. 1909.

WILLIAM T. RAWLINS,  
*United States Attorney.*

(Endorsed:) No. 366. Title of court and cause. Petition for writ of error and supersedeas. Filed March 23, 1909. A. E. Murphy, clerk. By (sgd.) A. A. Deas, deputy clerk.

503 District Court of the United States in and for the Territory of Hawaii.

THE UNITED STATES OF AMERICA, PLAINTIFF, }  
*versus*  
JOHN WYNNE, DEFENDANT. }

*To the United States of America, the above-named plaintiff, and to its attorney:*

You and each of you will please take notice hereby that on Tuesday, the 23rd day of March, 1909, we shall present to said court the petition for writ of error herein and assignment of errors herein, and shall move said court to allow said writ of error and to direct the issuance of the same, and of the citation herein. Copies of said petition for writ of error and of the assignment of errors herein are made a part of this notice, attached hereto and served herewith.

Dated Honolulu, Hawaii, March 23rd, 1909.

JOHN WYNNE, *Defendant.*

By THOMPSON & CLEMONS,

*His Attorneys.*

Due service of the foregoing notice and receipt of copies of the various papers therein referred to are hereby admitted this 23rd



day of March, A. D. 1909, and we hereby consent to the hearing of said petition for writ of error at the time set in the foregoing notice.

THE UNITED STATES OF AMERICA, *Plaintiff*,  
By WILLIAM T. RAWLINS, (Sgd.)  
*Asst. United States District Attorney.*

504 (Endorsed:) No. 366. Title of court and cause. Notice of  
hearing petition for writ of error. Filed March 23, 1909.  
A. E. Murphy, clerk. By (sgd.) A. A. Deas, deputy clerk.

505 In the United States District Court for the Territory of  
Hawaii.

JOHN WYNNE, PLAINTIFF IN ERROR,  
*versus*

THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

*Assignments of error.*

Now comes John Wynne, plaintiff in error in the above-entitled cause, said cause being originally entitled in said court, "The United States of America, plaintiff, versus John Wynne, defendant, No. 366," and in connection with and as a part of his petition for writ of error this day filed herein, the said plaintiff in error makes the following assignments of error upon which he will rely upon his prosecution of said writ of error, to wit:

1.

The said United States district court for the Territory of Hawaii erred in overruling the defendant's demurrer to the indictment in said cause.

And the grounds of said assignment of error are:

(a) That said indictment does not state facts sufficient to constitute a crime or offense within, under, or against the laws of the United States of America;

506 (b) That no count of said indictment states facts sufficient to  
constitute a crime or offense within, under, or against the laws  
of the United States of America;

(c) That the several counts of said indictment are inconsistent with each other;

(d) That there is a variance between the several counts of said indictment;

(e) That the said court is and was at all times herein without jurisdiction to try the defendant (plaintiff in error) for any act set forth in said indictment;

(f) That the statute upon which the said indictment is predicated, to wit, Revised Statutes of the United States of America, section 5339, is unconstitutional and void.

## 2.

The said court erred in overruling ground numbered "3" of the said demurrer and in holding that the "third count" of said indictment states facts sufficient to constitute a crime or offense within, under, or against the laws of the United States of America.

And the grounds of said assignment of error are:

(a) That the "third count" aforesaid does not state facts sufficient to constitute a crime or offense, within, under, or against the laws of the United States of America;

(b) That the said court is and was at all times herein without jurisdiction to try the defendant for any act set forth in said "third count;"

(c) That the statute upon which said "third count" is predicated, to wit, Revised Statutes of the United States of America, section 4339, is unconstitutional and void.

## 3.

507 The said court erred in overruling ground numbered "4" of said demurrer and in holding that the "fourth count" of said indictment states facts sufficient to constitute a crime or offense within, under, or against the laws of the United States of America.

And the grounds of said assignment of error are:

(a) That the "fourth count" aforesaid does not state facts sufficient to constitute a crime or offense within, under, or against the laws of the United States of America;

(b) That the said court is and was at all times herein without jurisdiction to try the defendant for any act set forth in said "fourth count;"

(c) That the statute upon which said "fourth count" is predicated, to wit, Revised Statutes of the United States of America, section 5339, is unconstitutional and void.

## 4.

The said court erred in overruling ground numbered "5" of the said demurrer, and in holding that the "fifth count" of said indictment states facts sufficient to constitute a crime or offense within, under, or against the laws of the said United States of America.

And the grounds of said assignment of error are:

(a) That the "fifth count" aforesaid does not state facts sufficient to constitute a crime or offense within, under, or against the laws of the United States of America;

(b) That the said court is and was at all times herein without jurisdiction to try the defendant for any act set forth in said "fifth count;"

508 (c) That the statute upon which said "fifth count" is predicated, to wit, Revised Statutes of the United States of America, section 5339, is unconstitutional and void.

## 5.

The said court erred in overruling ground numbered "6" of said demurrer and in holding that the "sixth count" of said indictment states facts sufficient to constitute a crime within, under, or against the laws of the United States of America.

And the grounds of said assignment of error are:

(a) That the "sixth count" aforesaid does not state facts sufficient to constitute a crime or offense within, under, or against the laws of the United States of America;

(b) That the said court is and was at all times herein without jurisdiction to try the defendant for any act set forth in said "sixth count;"

(c) That the statute upon which the said "sixth count" is predicated, to wit, Revised Statutes of the United States of America, section 5339, is unconstitutional and void.

## 6.

The said court erred in overruling ground numbered "7" of the said demurrer, and in holding adversely to said ground that the several counts of said indictment are not inconsistent with each other.

And the ground of said assignment of error is that the several counts of said indictment are inconsistent with each other.

## 7.

The said court erred in overruling ground numbered "8" of the said demurrer, and in holding adversely to said ground  
509 that there is no variance between the several counts of said indictment.

And the ground of said assignment of error is that there is a variance between the several counts of said indictment.

## 8.

The said court erred in allowing Mr. W. L. Whitney to appear at the trial of said cause and participate therein as assistant to Mr. W. T. Rawlins, assistant United States district attorney, in the conduct of said trial.

And the grounds of said assignment of error are:

(a) That Mr. Whitney was not at any time herein an officer of the United States;

(b) That Mr. Whitney was not at any time herein authorized by law to appear for the United States in said cause;

(c) That Mr. Whitney was not at any time herein a United States district attorney or his deputy;

(d) That Mr. Whitney was not at any time herein in any way connected with the department of the United States Attorney-General; and,

(3) That Mr. Whitney was not at any time herein commissioned by the United States.

## 9.

The said court erred in permitting James Reed, a witness produced and sworn in behalf of the plaintiff (defendant in error), to testify over the objection and exception of the defendant (plaintiff in error), and in response to said plaintiff's question, "What flag does the steamer 'Rosecrans' fly?" as follows, to wit, "The American flag;" the said testimony being offered to prove the said ship's registration and enrollment.

And the ground of said assignment of error is that the said testimony was and is incompetent to prove, and is not the best evidence of, such registration or enrollment.

## 10.

The said court erred in permitting Captain Holmes, a witness produced and sworn in behalf of the plaintiff (defendant in error), to testify over the objection and exception of the defendant (plaintiff in error), and in response to said plaintiff's question, "What flag does she fly?" (referring to the said ship "Rosecrans"), as follows, to wit, "American flag;" the said testimony being offered to prove the said ship's registration and enrollment.

And the ground of said assignment of error is that the said testimony was and is incompetent to prove, and is not the best evidence of, such registration or enrollment.

## 11.

The said court erred in denying the motion of defendant (plaintiff in error) to strike out the said testimony of plaintiff's (defendant in error's) witness, Captain Holmes, given above under assignment of error numbered "10" as to what flag the said ship "Rosecrans" fled or carried.

The said error consisting in this, that the said testimony which was offered as evidence of the said ship's registration and enrollment was and is incompetent to prove, and not the best evidence of, such registration or enrollment.

## 511

## 12.

The said court erred in permitting the said captain Holmes, witness for plaintiff (defendant in error), to testify over the objections and exceptions of the defendant (plaintiff in error), as to the enrollment of the said ship "Rosecrans" and as to the enroll-

ment papers of said ship, and in permitting the said Captain Holmes to testify over the objections and exceptions of the defendant (plaintiff in error) as to or by way of identifying the signature of one Farley, alleged deputy collector of customs in San Francisco, the said testimony of said witness being in substance as follows, to wit: That he was familiar with the enrollment papers of the said ship "Rosecrans;" that they "have got to be kept aboard the ship;" that he has seen the signature of Mr. Farley, the deputy collector of customs in San Francisco several times "on licenses and so forth;" that he is familiar with the seal of the department of customs in San Francisco, and with the enrollment papers aboard the said ship "Rosecrans;" that the signature of the said Farley appears in all the licenses aboard the said vessel, in the chart room and the pilot house and in all the licenses issued yearly to the said ship, and that he had occasion "lots of times," "quite often" to see them; that he, the said witness, has received these licenses himself from the custom-house; that he has seen the said signature appear on the licenses issued to said ship "to run for one year;" and that he was on said ship as second mate and as mate and as master, and had seen such license

512 hanging in the chart room of said ship; said testimony having all been admitted over the defendant's objections and exceptions duly taken. But (on cross-examination by defendant's

attorney) the testimony of said witness also being in substance: That he had never seen Mr. Farley write his signature himself, and knew nothing about his writing from having seen him write.

And the ground of said assignment of error is that the testimony of said witness as to signature was hearsay testimony and that his testimony aforesaid, which includes the substance of all that he said on this point, did not qualify him as competent to testify as to said signature, and that his testimony as to said registration and enrollment was incompetent to prove the same and not the best evidence of said registration or enrollment.

## 13.

The said court erred in admitting in evidence in behalf of the plaintiff (defendant in error) a document purporting to be a certificate of enrollment of said ship "Rosecrans," and containing the alleged signature of one N. S. Farley, alleged deputy collector of customs in San Francisco, the said document being marked, and referred to herein as "Government's Exhibit 2;" copy whereof is as follows:

513 The said error consisting in this, that:

(a) There was no proof that the said document came from the office of the collector of customs of the district and port of San Francisco, or from any other office which is the legal custodian of the document;

(b) It did not and does not appear that N. S. Farley is the deputy collector of customs of the port of San Francisco or holds any other official position;

(c) The document purporting to be a copy of a certificate of enrollment is not authenticated as required by statute;

(d) There was no proof that the said purported copy is a copy of the document sought to be proved, except that it is marked "Copy," and purports to be certified to by one N. S. Farley as being a true copy;

(e) There is no proof that the said certificate of enrollment was or is in force at the time in question in said cause;

(f) It affirmatively appears from the said purported certificate of enrollment that it has been signed not by N. S. Farley, but by N. S. Farley through the medium of some one else who initials himself "W.;"

(g) There is no proof that said witness who testified with regard to the signature of N. S. Farley knows the signature of N. S. Farley except as it is signed by one who signs himself by the initial "W.;"

(h) There is no proof that the signature of N. S. Farley, deputy collector of customs, is in reality the signature of N. S. Farley;

(i) There is no evidence as to the purported seal of any department of the Government.

514

14.

The said court erred in denying the motion of the defendant (plaintiff in error) to strike out the said purported certificate of enrollment, admitted in evidence as "Government's Exhibit 2" aforesaid; and the defendant assigns as the grounds of said error the same grounds as are hereinabove set forth at length under assignment of error numbered "13."

15.

The said court erred in permitting the said Captain Holmes, witness for the plaintiff (defendant in error), to testify over the objection and exception of the defendant (plaintiff in error), and in response to said plaintiff's question as to who are the owners of the said ship "Rosecrans," as follows, to wit: "Well, all I go by is the ship's papers—National Oil and Transportation Co.;" the said testimony being offered to prove the ownership of said vessel "Rosecrans."

And the ground of said assignment of error is that the said testimony is hearsay, is incompetent to prove ownership, and is not the best evidence of ownership.

16.

The said court erred in denying the motion of defendant (plaintiff in error) to strike out the said testimony of plaintiff's (defendant in error's) witness, Captain Holmes, given above under assignment of error numbered "15." as to the ownership of said ship "Rosecrans."

And the ground of said assignment of error is that the said testimony is hearsay, is incompetent to prove ownership, and is not the best evidence of ownership.

515

17.

The said court erred in denying the defendant's motion for directed verdict; and the grounds of said error are:

(a) That the said court was at all times herein without jurisdiction to try the defendant for any act set forth in the indictment herein;

(b) That the evidence in said cause is only that the act or acts charged in said indictment was or were committed on a vessel moored at and tied to a wharf in the harbor of Honolulu and not on the high sea or high seas;

(c) That there is no evidence or proof in said cause that the ship "Rosecrans" named in said indictment was at the time of the act or acts charged an American vessel;

(d) That there is no evidence or proof in said cause of the nationality of said vessel;

(e) That there is no proof or evidence, or anything to show in said cause that the act or acts charged against the defendant was or were committed outside of any State, as State is defined by or known to the law;

(f) That the proof or evidence in said cause shows that the act or acts here charged was or were committed in the Territory of Hawaii and within a State as the term "State" is known to the law;

(g) That the statute upon which the said indictment herein is predicated, to wit, Revised Statutes of the United States of America, section 5339, is unconstitutional and void.

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18.

The said court erred in denying the said motion for directed verdict, and in holding adversely to ground numbered "1" thereof, that said court had jurisdiction to try the defendant for any act set forth in said indictment.

And the ground of said assignment of error is that the said court was without jurisdiction to try the defendant for any set forth in said indictment.

19.

The said court erred in denying the said motion for directed verdict, and in not sustaining ground numbered "2" thereof, namely, that there is no evidence or proof in said cause that the act or acts charged against the defendant in said indictment was or were committed on the "high seas."

And the ground of said assignment of error is that the said United States district court for the Territory of Hawaii has and could have jurisdiction only of crimes and felonies committed on the high seas.



## 20.

The court erred in denying the said motion for directed verdict, and in not sustaining ground numbered "3" thereof, namely, that the evidence in said cause was only that the act or acts charged in said indictment against the defendant was or were committed only on a vessel moored at and tied to a wharf in the harbor of Honolulu, and not on the "high sea" or "high seas."

And the ground of said assignment of error is that the said court never at any time herein had jurisdiction over crimes or offenses  
517 committed *committed* on a vessel moored at and tied to a wharf in the harbor of Honolulu and never at any time herein had jurisdiction over crimes or offenses committed on a vessel not on the "high sea" or "high seas."

## 21.

The said court erred in denying the said motion for directed verdict and in not sustaining ground numbered "4" thereof, namely, that there was no evidence or proof in said cause that the ship "Rosecrans" named in said indictment was at the time of the act or acts charged an American vessel.

And the ground of said assignment of error is that such fact was one of the allegations of the said indictment and of each count thereof and necessary to be proved.

## 22.

The said court erred in denying the said motion for directed verdict and in not sustaining ground numbered "5" thereof, namely, that there was no evidence or proof in said cause of the nationality of said vessel.

And the ground of said assignment of error is that there was no evidence or proof in said cause of the nationality of said vessel.

## 23.

The said court erred in denying the said motion for directed verdict and in not sustaining ground numbered "6" thereof, namely, that there was no proof or evidence, or anything herein to show, that the act or acts charged against the defendant was or were committed outside of any State as State is defined by or known to the law.

518 And the ground of said assignment of error is that there was no proof or evidence or anything herein to show that the act or acts charged against this defendant was or were committed outside of any State as State is defined by or known to the law.

## 24.

The court erred in denying the said motion for directed verdict and in not sustaining ground numbered "7" thereof, namely,

that the proof or evidence in said cause shows that the act or acts in said cause charged was or were committed in the Territory of Hawaii, and within a State as the term "State" is known to the law.

And the ground of said assignment of error is that the proof or evidence in said cause shows that the act or acts in said cause charged against the defendant was or were committed in the Territory of Hawaii and within a State as the term "State" is known to the law.

## 25.

The court erred in denying the said motion for directed verdict and in not sustaining ground numbered "8" thereof, that the statute upon which the indictment in said cause is predicated, to wit, Revised Statutes of the United States of America, section 5339, is unconstitutional and void.

And the ground of said assignment of error is that the statute aforesaid is unconstitutional and void in this, that the Congress of the United States of America is, and at all times herein was, without power or authority to define and punish murder or manslaughter committed in any arm of the sea or in any river, haven, creek, basin, or bay within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.

## 26.

The said court erred in refusing to give defendant's requested instruction No. 5, which is as follows, to wit:

In order to convict this defendant upon the evidence of circumstances it is necessary not only that all of the circumstances concur to show that he committed the crime charged, but also that they are inconsistent with any other rational conclusion. It is not intended that a particular hypothesis explain all the phenomena of circumstantial evidence; nothing must be inferred because if true it would account for the facts. Every reasonable hypothesis by which the facts may be explained, consistent with innocence, must, therefore, be vigorously examined and successfully eliminated, and only that no other supposition would reasonably account for all the conditions in the case can the conclusion of guilt be legitimately adopted. I feel it my duty, in the language of the learned Chief Justice Shaw, to warn you that great care and caution should be exercised by you in drawing inferences from proved facts, because the chief danger to be avoided in dealing with circumstantial evidence arises from the proneness natural to men to jump at conclusions from certain facts without duly averting to other facts which are inconsistent with a hypothesis which the first facts would seem to indicate.

## 27.

520 The said court erred in refusing to give defendant's requested instruction No. 9, which is as follows, to wit:

I instruct you that the law presumes the defendant innocent in this case and not guilty as charged in the indictment, and the presumption

should continue and prevail in the minds of the jury until they are satisfied beyond all reasonable doubt of the guilt of the defendant; and acting upon this presumption, the jury should acquit the defendant unless constrained to find him guilty by the evidence convicting him of such guilt beyond all reasonable doubt, and that the presumption of innocence is not a mere form to be disregarded by the jury at pleasure, but it is an essential, substantial part of the law of the land and binding upon the jury in this case. The Supreme Court of the United States has held that the presumption of evidence (innocence) is evidence created by law in form of the accused; and it is the duty of the jury to give the defendant the full benefit of this presumption of innocence until the proof is adduced which establishes his guilt beyond a reasonable doubt, and whether the proof be direct or circumstantial, it must be such as excludes any rational hypothesis of the innocence of the accused. Guilt of a party is not to be inferred because the facts proved are consistent with his guilt, but they must be inconsistent with innocence.

## 28.

The said court erred in refusing to give defendant's requested instruction No. 13, which is as follows, to wit:

521 I instruct you that malice aforethought is the especial characteristic which distinguishes the crime of murder from other cases of killing a human being; and that malice or mental condition marks the boundary which separates the two crimes of murder and manslaughter.

## 29.

The said court erred in giving its own instruction, as follows, in place of and as a modification of defendant's requested instruction No. 13, aforesaid:

The crime of murder is not defined in the statute and we have to refer to the common law and the decisions of courts therefor, wherein we find that murder is the unlawful killing of any human being by a person of sound memory and discretion, with malice aforethought, expressed or implied. Malice, in this connection, is an intention to do bodily harm—a formed design to do mischief. It includes premeditation. There must therefore be a period of prior consideration, but as to the duration of such period no limit can be arbitrarily assigned. There is no time so short but that within it the human mind can form a deliberate purpose to do an act, and if the intent to do mischief to another is thus formed, after no matter how short a period of reflection, it is none the less malice aforethought. The existence or nonexistence of malice is a conclusion to be drawn by the jury from all the facts in the case and from a careful study of the acts of the defendant and of the circumstances connected with the crime charged. The term malice is here used in a technical sense, and includes not merely hatred and revenge, but every bad, unjustifiable

motive. Express malice exists when one, with deliberate premeditation and design, formed in advance, kills another, 522 such premeditation and design being manifested by external circumstances capable of proof, such as lying in wait, antecedent threats, and concerted schemes to do the party bodily harm.

Malice is implied by the law from any deliberate and cruel act committed by one person against another. Thus, it is implied when one man kills another without provocation, or where the provocation is not great; for no person except one of abandoned heart can be guilty of such an act without a cause, or upon any slight cause. The terms express and implied malice in truth indicate the same state of mind, but they are established in different ways; the one by circumstances showing premeditation of the homicide and the other being inferred only from the act committed.

What a man actually does is evidence of his intention, as a rule. It is our common experience that where a man performs an act which will obviously produce a particular result, he has intended the result. Therefore when a homicide is committed by weapons indicating design it is not necessary to prove that such design existed at any definite period before the fatal blows. There are, however, more or less other facts and circumstances connected with such conduct which may tend to explain it on the theory of an absence of malice or on a theory of actual lawfulness. For instance, circumstances of self-defense which justify homicide. It sometimes happens in a case of a homicide that there are circumstances of affray in which a man is killed in the course of a quarrel by a blow unconnected with any intention to kill, and so without malice. In such a case the person committing the homicide would be guilty only of manslaughter. 523 There are other circumstances in which a homicide is committed through carelessness or negligence, in which case the inference of malice is explained away and the person committing the homicide is guilty only of manslaughter. But where these and other circumstances which disprove a malicious intent do not exist, then the fact of causing death through the use of a dangerous weapon implies malice and is murder, with the exception that is raised by the defense of insanity or intoxication, where the degree of insanity or intoxication is such that the person committing the homicide is incapable of forming a malicious intent or of harboring a design.

The error aforesaid consisting in this:

(a) That the said instruction and charge undertakes to define manslaughter, but does so only partially and unfairly, and not fully and fairly;

(b) That the said instruction and charge assumes that a person must be incapable of malicious intent or of harboring a design in order to have the defense of insanity or intoxication available in his behalf, or in order to reduce the degree of the act from murder to manslaughter or to unpunishable homicide;

(c) That the said instruction and charge does not recognize or give effect to the fact that insane persons have insane malice and

often intend to do just what they do accomplish, and work out plans and schemes all as the result of an insane idea or delusion; their design being an insane design induced by an insane condition of mind; their impulse to do being an insane impulse, and they knowing the act accomplished to be wrong but not being able to resist doing it.

And the part of the said instruction to which this assignment  
524 of error is directed is that part reading as follows, to wit:

It sometimes happens in a case of a homicide that there are circumstances of affray in which a man is killed in the course of a quarrel by a blow unconnected with any intention to kill and so without malice. In such a case the person committing the homicide would be guilty only of manslaughter. There are other circumstances in which a homicide is committed through carelessness or negligence, in which case the inference of malice is explained away and the person committing the homicide is guilty only of manslaughter. But where these and other circumstances, which disprove a malicious intent, do not exist, then the fact of causing death through the use of a dangerous weapon implies malice and is murder, with the exception that is raised by the defense of insanity or intoxication, where the degree of insanity or intoxication is such that the person committing the homicide is incapable of forming a malicious intent or of harboring a design.

30.

The said court erred in refusing to give defendant's requested instruction No. 16, which is as follows, to wit:

I instruct you that the defendant is presumed to be innocent and that you can not, therefore, convict him on negative testimony, for nothing short of a universal negative excluding every possible doubt will overcome the presumption in his favor. The positive testimony of one credible witness on any material matter is entitled to more weight than the testimony of several other witnesses, equally credible, who testify negatively on the same subject.

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31.

The said court erred in giving its own instruction, as follows, in place of and as a modification of defendant's requested instruction No. 16 aforesaid.

Counsel for the defendant has asked for this instruction as to positive and negative testimony in relation to the evidence of the intoxication of defendant:

"I instruct you that the defendant is presumed to be innocent, and that you cannot therefore convict him on negative testimony, for nothing short of a universal negative excluding every possible doubt will overcome the presumption in his favor. The positive testimony of one credible witness on any material matter is entitled to more weight than the testimony of several other witnesses equally credible who testify negatively on the same subject."

I can not give this instruction exactly as asked for, because it is not clear what the counsel for the defendant means by positive and negative testimony. Positive and negative testimony differs in this way: One witness may testify that a certain person said so and so; another witness may testify that he did not hear him say it. Unless he was so near to the person speaking that he must have heard the testimony, his negative testimony cannot be equal to the testimony of the other witness who said that he heard him say it; and even if the second witness was near enough to have heard if he had been listening, yet his attention may have been occupied for the moment by something else, so that in that case his testimony is not as strong as that of the other. A denial of a proposition is not negative testimony in the sense that defendant's counsel uses the words. A witness is asked if he went to town on a certain day and he answers "no;" this answer is as good as the testimony of another who asserts that he saw him in town on that day and may be better, and may be classed as positive testimony. Another witness says that he did not see him in town. This is negative testimony and is worth little,

526 as the man may have been in town without being seen by such witness. A witness who answers "I don't know" to a question is not testifying at all, but is stating his inability to testify. There are degrees of positive testimony. One says a certain person was angry, another says he was somewhat excited and may have been angry; these are both instances of positive testimony, but of different values. Another witness says he was not angry. This is positive testimony, though in a negative form, and is equal to the statement of the first witness. Therefore, in regard to the testimony of the witnesses in this case in relation to the intoxication of the defendant you will understand that testimony that may differ as to the confidence of the witnesses as to their ability to answer the question may be all positive testimony but different in strength. A witness who saw the man and yet makes no statement of his impressions as to the defendant's condition, but says substantially that he does not know, is confessing his inability to testify, but if he was so near the man and under circumstances that he ought to have known, such as conversing with him or watching him, then his answer that he "don't know," or words to that effect, may be considered by you as a circumstance bearing on the probability that he would have known or would have received an impression on the subject if the defendant had been considerably intoxicated. On the other hand, the want of confidence of such a witness in his own knowledge might also be considered as to the question of the defendant's condition of sobriety, because usually a man who talks with another man who is perfectly sober would be able to testify to that effect. All of this evi-

527 dence as to the drunken or sober condition of defendant must be weighed by you under this attempted analysis of such questions, keeping in mind the general rule that the evidence of a man who says that he knows a thing is better than that of another man



who says he does not know it, having some opportunity to know, or who has a doubt of the matter.

The error aforesaid consisting in that that the said instruction is unfair in failing to direct the jury's attention to the fact that nothing short of a universal negative excluding every possible reasonable doubt will overcome the presumption of innocence in favor of the defendant; and that the said instruction does not give due weight to said presumption of innocence.

## 32.

The said court erred in refusing to give defendant's requested instruction No. 17, which is as follows, to wit:

You are instructed that while it is true that every man is presumed at all times to be sane and to be mentally competent, yet whenever by the testimony the question of insanity or of mental capacity or competency is raised the fact of sanity or of mental capacity or competency must, like any other fact in a criminal case, be established by the prosecution beyond all reasonable doubt.

## 33.

The said court erred in giving its own instruction, as follows, in place of and as a modification of defendant's requested instruction No. 17 aforesaid:

528 Where the defense of intoxication is made to a charge of murder, the burden is upon the Government to establish not only all the other essential facts constituting the offense, but to establish also the proposition that the defendant at the time of the homicide was of sound mind; and by this term is not meant that he was of perfectly sound mind, but that he had sufficient mind to know that the act he was committing, at the time he was performing it, was a wrongful act in violation of human law and that he could be punished therefor, and that he did not perform the act because being of unsound mind he was controlled by irresponsible and uncontrollable impulse or was incapable of premeditation.

The error aforesaid consisting in this that said instruction, while stating that knowledge of right and wrong is essential to criminal responsibility, fails to point out that the power of self-control is also essential, or in other words, whatever a man's knowledge may be, that man is not responsible for what he cannot control.

## 34.

The said court erred in refusing to give defendant's requested instruction No. 20, which is as follows, to wit:

I instruct you that if you have any reasonable doubt as to the presence at the time of the act charged of that self-determining, self-controlling power in the defendant which in a sane mind makes it conscious of the real nature of its own purposes and capable of re-



sisting wrong impulses, then you cannot find the defendant guilty of the crime charged, but can only find him guilty, if at all, of the crime of manslaughter herein defined.

529

35.

The said court erred in refusing to give defendant's requested instruction No. 21, which is as follows, to wit:

While voluntary intoxication is no excuse for the commission of a crime, yet if, upon the whole evidence in this case, you shall have a reasonable doubt whether because of intoxication at the time of the killing, if you shall find from the evidence that the accused did kill the deceased and that he was intoxicated at the time, he had sufficient mental capacity to deliberately think upon and rationally determine so to kill the deceased, then you cannot find him guilty of murder although such inability was the result of intoxication.

36.

The said court erred in refusing to give defendant's requested instruction No. 22, which is as follows, to wit:

I instruct you that while intoxication is no excuse for crime, if you believe from the evidence that the defendant was intoxicated at the time the crime was committed, it should be considered for the purpose of ascertaining the condition of the mind of the accused in order to determine whether he was capable of entertaining that specific intent which is an essential ingredient of the particular crime with which he is charged, namely, murder, to determine whether, under all of the circumstances of the case, the defendant is guilty of murder, or a less crime to which such essential ingredient is not material.

37.

530 The said court erred in refusing to give defendant's requested instruction No. 23, which is as follows, to wit:

The court instructs you that though the fact of intoxication at the time of the commission of a crime is no excuse, or justification therefor, yet when it is essential, as it is in this case essential, to the crime charged in the indictment, that a particular and specific intent be at the time entertained, the fact of intoxication, if you find there was intoxication, should be weighed and considered in determining the capacity of the defendant to entertain such an intent. And in this case, if the jury find from the evidence that the defendant did kill the deceased, and that at the time of the commission of the homicide the defendant was by reason of intoxication incapable of entertaining an intent to kill, or if they have any reasonable doubt whether he was at the time in question capable of entertaining such an intent, he cannot be convicted of murder, but if at all, only of some degree of homicide to which an intent is not material.

The court erred in giving its own instruction, as follows, in place of and as a modification of defendant's requested instructions No. 20, No. 21, and No. 22, aforesaid:

The defense of intoxication is made in this case, and I charge you that it is no defense, excuse, or palliation unless it is shown to have reached such a stage at the time of the homicide that the defendant was thereby rendered incapable of harboring a  
531 malicious intent or of forming a design or of understanding or remembering the lawless nature of the act of taking human life and that it is forbidden and punishable by law. The homicide must be wilful and intentional in order to warrant a conviction of murder.

Where the defense of intoxication is made to a charge of murder the burden is upon the Government to establish not only all the other essential facts constituting the offense, but to establish also the proposition that the defendant at the time of the homicide was of sound mind, and by this term is not meant that he was of perfectly sound mind but that he had sufficient mind to know that the act he was committing at the time he was performing it was a wrongful act, in violation of human law and that he could be punished therefor, and that he did not perform the act because being of unsound mind he was controlled by irresponsible and uncontrollable impulse, or was incapable of premeditation.

If from all the evidence in the case you believe beyond a reasonable doubt that the defendant committed the crime of which he is accused in manner and form as charged in the indictment, and that at the time of the commission of such crime the defendant knew that it was wrong to commit such crime, and was mentally capable either to do or not to do the act or acts constituting such crime, and of governing his conduct in accordance with such choice, then it is your duty under the law to find him guilty of murder, even though you should believe, from the evidence, that at the time of the commission of the crime he was not entirely and perfectly sane, or that he was greatly  
excited or enraged, or under the influence of intoxicating liquor.

532 I instruct you that in order to convict the defendant of any crime under this indictment you must first find beyond all reasonable doubt that he killed the deceased. If you find the fact of killing by defendant, you still cannot find him guilty of murder unless you also find beyond all reasonable doubt that at the time in question the defendant was capable of entertaining that specific intent which is an essential ingredient of the crime, and for this purpose you should take into consideration the nature and circumstances of the assault, the actions, conduct, and demeanor of the defendant and his declarations both before and after the homicide, and especially to consider whether his mental capacity was sufficient to enable him to entertain the simple intent to kill under the circumstances, or whether his mental faculties were so obscured by intoxication as to

have rendered him incapable of entertaining that intent. On the question of intent it is proper for you to consider the previous declarations of the defendant which may tend to show that he entertained a grudge of some kind against McKinnon upon grounds that may have been real or fanciful, and any declarations that may have been made by him subsequent to the homicide expressing a similar feeling.

The question as to his responsibility relates to the time of the homicide. It matters not what may have been his condition before or after, although evidence as to his condition before and after may be considered by you in ascertaining his condition at the time of the homicide.

To murder, malice aforethought is essential. Malice is a formed design to kill. It includes premeditation, but the action of the  
533 mind is sometimes so swift that premeditation may exist within the shortest time. The act of killing implies malicious intent. Where the mind is so confused by intoxication that it is incapable of forming a design to kill or to understand the nature of such an act and its consequences the crime of murder cannot exist. Where such is the case, if the person has voluntarily placed himself in such condition of intoxication that he is incapable of forming a design to kill, and commits the homicide, he then is guilty of manslaughter.

39.

The said court erred in refusing to give defendant's requested instruction No. 27, which is as follows, to wit:

I instruct you that in order to find the defendant guilty of any crime of homicide, it is necessary that the act or acts here charged should have been committed outside of any State, which term State includes not only States admitted to the Union of States known as the United States, but it includes also an organized Territory, such as the Territory of Hawaii. I therefore instruct you that unless you find that the act or acts here charged were committed outside of the Territory of Hawaii you cannot find the defendant guilty.

40.

The said court erred in giving the following instruction during the course of its charge to the jury, to wit:

I instruct you that the harbor of Honolulu is a haven or an arm of the Pacific Ocean, and that the waters of Honolulu Harbor  
534 are within the admiralty and maritime jurisdiction of the United States, and that the harbor of Honolulu is without the jurisdiction of any particular State.

And the grounds of said assignment of error are:

(a) That the said court had and has no jurisdiction over crimes or offenses committed in the harbor of Honolulu;

(b) That the harbor of Honolulu is not without the jurisdiction of any particular State, as the term "State" is known to the law.

## 41.

The said court erred in giving to the jury its own instruction and charge relating to circumstantial evidence as follows, to wit:

In order to convict this defendant upon the evidence of circumstances, and the admissions of the defendant testified to are in the nature of circumstances, it is necessary, not only that all of the circumstances concur to show that he committed the crime charged but also that they are inconsistent with any other rational conclusion. Only when every reasonable hypothesis by which the facts might be explained consistently with innocence have been carefully examined and found wanting can the conclusion of guilt be legitimately adopted.

You cannot convict this defendant upon evidence merely showing a possible opportunity for the commission of the alleged offense, if there be any such evidence before you, nor can you convict him upon surmises, speculations, and conjectures, nor can you convict him upon suspicion, no matter how strong. In all criminal cases the  
535 proof inculcating the accused should be of a degree of certainty transcending mere possibility, or probability, mere surmises and conjectures, and transcending strong suspicion. The evidence in a criminal case may, let it be assumed, create a strong suspicion, or it may create a strong probability that the defendant's complicity in the alleged crime is established as charged, but I instruct you that the law, in its wise and humane demand for the life and liberty of a human being, requires more than a strong suspicion or strong probability; it demands that the evidence should lead to a conclusion of guilt beyond every other hypothesis and to the exclusion of all reasonable doubt. Less than this will not suffice, and you are therefore charged that you will not be justified in finding this defendant guilty upon the grounds that it is more probable that he is guilty, if there are any such grounds, than that he is innocent.

The error aforesaid consisting in this that the part of said instruction which states that "the admissions of the defendant testified to are in the nature of circumstances," is not a true or correct statement of the law in the premises.

## 43.

The said court erred in giving to the jury its own instruction and charge as follows, relating to mental competency, sanity, and capacity, and intoxication as affecting mental capacity:

The defense of intoxication is made in this case and I charge you that it is no defense, excuse, or palliation unless it is shown to have reached such a stage at the time of the homicide that the defendant was thereby rendered incapable of harboring a malicious intent  
536 or of forming a design or of understanding or remembering the lawless nature of the act of taking human life and that it is forbidden and punishable by law. The homicide must be wilful and intentional in order to warrant a conviction of murder.

Where the defense of intoxication is made to a charge of murder, the burden is upon the Government to establish not only all the other essential facts constituting the offense, but to establish also the proposition that the defendant at the time of the homicide was of sound mind, and by this term is not meant that he was of perfectly sound mind but that he had sufficient mind to know that the act he was committing at the time he was performing it was a wrongful act in violation of human law and that he could be punished therefor, and that he did not perform the act because being of unsound mind he was controlled by irresponsible and uncontrollable impulse, or was incapable of premeditation.

If from all the evidence in the case you believe beyond a reasonable doubt that the defendant committed the crime of which he is accused, in manner and form as charged in the indictment, and that at the time of the commission of such crime the defendant knew that it was wrong to commit such crime, and was mentally capable either to do or not to do the act or acts constituting such crime, and of governing his conduct in accordance with such choice, then it is your duty under the law to find him guilty of murder, even though you should believe, from the evidence, that at the time of the commission of the crime he was not entirely and perfectly sane, or that he was greatly excited or enraged, or under the influence of intoxicating liquor.

537 I instruct you that in order to convict the defendant of any crime under this indictment you must first find beyond all reasonable doubt that he killed the deceased. If you find the fact of killing by defendant, you still cannot find him guilty of murder unless you also find beyond all reasonable doubt that at the time in question the defendant was capable of entertaining that specific intent which is an essential ingredient of the crime, and for this purpose you should take into consideration the nature and circumstances of the assault, the actions, conduct, and demeanor of the defendant and his declarations both before and after the homicide, and especially to consider whether his mental capacity was sufficient to enable him to entertain the simple intent to kill under the circumstances, or whether his mental faculties were so obscured by intoxication as to have rendered him incapable of entertaining that intent. On the question of intent it is proper for you to consider the previous declarations of the defendant which may tend to show that he entertained a grudge of some kind against McKinnon upon grounds that may have been real or fanciful, and any declarations that may have been made by him subsequent to the homicide expressing a similar feeling.

The question as to his responsibility relates to the time of the homicide. It matters not what may have been his condition before or after, although evidence as to his condition before and after may be considered by you in ascertaining his condition at the time of the homicide.

Although the trial of one charged with the commission of a crime should always be consistent with the principles of justice—that  
538 is, he should be tried fairly with all of the privileges, presump-

tions in his favor, and opportunities of defense which the long evolution of the practice of courts in common law countries have gained for accused persons—yet the end sought for in such a trial is not justice as we understand the word in relation to the trial of a civil case, where the object is to cause the litigating parties to render to each other what is rightfully due. The purpose of the criminal laws is to protect society, and the trial of one charged with their violation is an inquest as to his guilt, leading to his punishment if he is found guilty, without considering any compensation to the injured parties. The punishment relates to both the criminal and others; to him by way of removing him for a time or permanently from opportunities of repeating his crime, and as a lesson and a warning to him against a repetition of his guilty conduct whenever he may regain his liberty, and to others of like criminal tendencies as a deterring object lesson and example.

This explanation may throw some light on the theory reached by the courts in relation to the defense of insanity or intoxication, in which a status of responsibility as regards power of deliberation, capability of forming a design or harboring an intent is necessary to a conviction, which, if present, the fact of insanity or intoxication is not a defense.

The reason of this rule is that the criminal law being enacted for the protection of society against violence and other conduct that is a menace to its security, the question of moral guilt does not figure in the investigation. The punishment of an intoxicated or partially insane person, who, however, at the time of his lawless  
539 act has capacity to commit crime as elsewhere explained, is justified as to himself for the reasons given above, and, as to others, because it is a warning to others, including the intoxicated or partially insane who have a criminal capacity, and, having it, have sufficient intelligence and caution to be warned and deterred by the punishment of one of like capacity with themselves. This applies to the person who commits a crime while under the influence of liquor, but who still retains sufficient consciousness to be able to form a design or entertain a criminal intent and to understand the character of the crime committed by him as to its lawlessness and the liability to punishment of one committing it.

There has been some divergence of opinion in the United States as to cases of homicide in which there is an absence of malice on the part of the defendant because his mental faculties at the time of the homicide are so demoralized by a condition of intoxication into which he has voluntarily entered that he is incapable of forming a specific intent to kill, some holding that under such circumstances the prisoner should be acquitted and others that he should be found guilty of manslaughter. The Supreme Court of the United States has recently adopted the latter view, and I charge you in accordance therewith that if the defendant, at the time of the killing, if you find that he killed McKinnon, was in such a condition of mind by reason of intoxication voluntarily acquired as to be incapable of forming a



specific intent to kill, or of understanding the nature of what he was doing, the grade of his crime would be reduced to manslaughter.

540 Manslaughter is the killing of a man unlawfully and wilfully, but without malice aforethought. Malice aforethought, as I have defined it to you, must be excluded from it; that is, the doing of a wrongful act without cause or excuse and in the absence of mitigating facts, in such a way as to show a heart void of social duty and a mind fatally bent upon mischief. If that is driven out of the case, it must come under the definition of the crime of manslaughter.

The principle of this rule appears to be this, that where a man voluntarily becomes drunk without any malicious purpose, he has without excuse or justification and with a reckless disregard for the rights and the safety of others, entered into a course of excessive and unrestrained indulgence in intoxicants, in itself a criminal offense, which tends to destroy his judgment and confuse and dull his perceptions, and at the same time to magnify his grievances, real or fanciful, and to develop delusions, and in short to reduce him to a condition of irresponsibility and frenzy in which the normal restraints to violence are obliterated. In doing this he is held to be responsible for an act of homicide committed while in such condition to the extent at least of being guilty of manslaughter therefor, if his mind was incapable of forming a specific intent at the time of the homicide, or of murder if though intoxicated he yet was capable of such intent and of understanding the lawlessness of the act.

The evidence of the defendant's condition of excitement immediately after the homicide does not require you to conclude that he was in such a state of excitement at the time of the homicide, for in his stimulated condition, if you believe that he had been drinking throughout the day, the act of the homicide may well have  
541 thrown him off his balance to a degree and have produced that state of excitement immediately after the homicide which has been testified to by some of the witnesses. In like manner the evidence that the defendant, while present at the coroner's inquest and after beginning to answer questions concerning the homicide, became excited, or as he was described by one of the witnesses, became unstrung, such unstrung or excited condition you are at liberty under the testimony to attribute to the fact that the day before he had been drinking considerably, or to the other fact of his narration of the terrible tragedy in which he was himself concerned.

To murder, malice aforethought is essential. Malice is a formed design to kill. It includes premeditation, but the action of the mind is sometimes so swift that premeditation may exist within the shortest time. The act of killing implies malicious intent. Where the mind is so confused by intoxication that it is incapable of forming a design to kill or to understand the nature of such an act and its consequences, the crime of murder can not exist. Where such is the case, if the person has voluntarily placed himself in such condition of intoxication that he is incapable of forming a design to kill, and commits the homicide, he then is guilty of manslaughter.



The error aforesaid consisting in this:

(a) That the said instruction and charge assumes that in order to have available any defense founded on insanity or intoxication, or in order to reduce the degree of homicide from murder to manslaughter or to unpunishable homicide, a person must be incapable of malice, or of malicious intent, or of harboring a design, or thinking or planning a malicious object or of having a malicious purpose;

542 (b) That the said instruction and charge does not recognize or give effect to the fact that insane persons have insane malice, and often intend to do just what they do accomplish, and work out plans and schemes all as the result of an insane idea or delusion; their design being an insane design induced by an insane condition of mind, their impulse to do being an insane impulse, and they knowing the act accomplished to be wrong but not being able to resist doing it.

44.

The said court erred in giving to the jury its own instruction and charge as follows, relating to confessions, admissions, or statements of the accused made against interest:

I instruct you that if you find from the evidence that the defendant made any statement or statements in relation to the offense charged in the indictment, after such offense is alleged to have been committed, you must consider such statement or statements all together. What the defendant said against himself, if anything, is likely to be true and is entitled to great weight because said against himself. What he said for himself, you are not bound to believe, because said in a statement or statements proved by the  
543 United States, but you may believe or disbelieve the whole or any part of it, as it is shown to be true or false by the evidence in the case.

The error aforesaid consisting in this, that the following portion of said instruction, to wit:

"What the defendant said against himself, if anything, is likely to be true and is entitled to great weight because said against himself. What he said for himself, you are not bound to believe, because said in a statement or statements proved by the United States, but you may believe or disbelieve the whole or any part of it, as it is shown to be true or false by the evidence in the case,"  
is unfair to the defendant; does not give due or any weight to the presumption of innocence in his favor, and is contrary to said presumption of innocence.

46.

The jury in said cause erred in returning its verdict finding the defendant guilty of murder as charged in said indictment.

And the grounds of said assignment of error are:

- (a) That said verdict was and is contrary to the law in said cause;
- (b) That said verdict was and is contrary to the evidence in said cause;
- (c) That said verdict was and is contrary to the weight of the evidence in said cause.

## 47.

543 The said court erred in overruling and denying the defendant's motion in arrest of judgment filed in said cause; and the grounds of said assignment of error are:

(a) That the said court is and was at all times herein without jurisdiction to try the defendant for any act set forth in said indictment, or for any act set forth in any count thereof;

(b) That the facts stated in said indictment do not constitute any crime or offense within, under, or against the laws of the United States of America;

(c) That the facts stated in each of the several counts of the said indictment do not constitute any crime or offense within, under, or against the laws of the United States of America;

(d) That the facts stated in the "third count" of said indictment do not constitute any crime or offense within, under, or against the laws of the United States of America;

(e) That the facts stated in the "fourth count" of said indictment do not constitute any crime or offense within, under, or against the laws of the United States of America;

(f) That the facts stated in the "fifth count" of said indictment do not constitute any crime or offense within, under, or against the laws of the United States of America;

(g) That the facts stated in the "sixth count" of said indictment do not constitute any crime or offense within, under, or against the laws of the United States of America;

(h) That the statute upon which the indictment herein  
545 is predicated, to wit, Revised Statutes of the United States of America, section 5339, is unconstitutional and void in this, that Congress has no power to define and punish murder "in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State."

(i) That no judgment against the defendant can be lawfully rendered on the record herein;

(j) That no judgment against the defendant can be lawfully rendered on the evidence herein.

## 48.

The said court erred in overruling and denying said motion in arrest of judgment and in refusing to grant said motion on ground numbered "1" thereof, that "this court is and was at all times herein

without jurisdiction to try the said defendant for any act set forth in the indictment or for any act set forth in any count thereof."

And the ground of said assignment of error is that the said court is and at all times herein was without jurisdiction to try the defendant for any act set forth in said indictment or set forth in any count thereof.

49.

The said court erred in overruling and denying said motion in arrest of judgment and refusing to grant said motion on ground numbered "2" thereof that "the facts stated in said indictment or in any count thereof do not constitute an offense against the 546 laws of the United States of America.

And the ground of said assignment of error is that the facts stated in said indictment or in any count thereof do not constitute an offense against the laws of the United States of America.

50.

The said court erred in overruling and denying said motion in arrest of judgment and refusing to grant said motion on ground numbered "3" thereof, that "the statute upon which the indictment herein is predicated, to wit, Revised Statutes of the United States, section 5339, is unconstitutional and void."

And the ground of said assignment of error is that the said statute is unconstitutional and void in this, that the Congress of the United States of America is and at all times herein was without jurisdiction or authority to define and punish murder or manslaughter committed "in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State."

51.

The said court erred in overruling and denying said motion in arrest of judgment and refusing to grant said motion on ground numbered "4" thereof, that "no judgment can be lawfully rendered on the record herein."

547 Wherefore the said plaintiff in error, John Wynne, prays that the judgment and sentence of the said United States District Court for the Territory of Hawaii be reversed, annulled, and held for naught, and that he, the said plaintiff in error, may have such other and further relief as may be proper in the premises.

Honolulu, March 23d, 1909.

(Sgd.)

JOHN WYNNE,

*Plaintiff in error.*

(Sgd.)

THOMPSON & CLEMONS,

*Attorneys for Plaintiff in Error.*

Due service of the foregoing assignments of error and receipt of a copy thereof are hereby admitted this 23d day of March, A. D. 1909.

(Sgd.)

WILLIAM T. RAWLINS,  
Asst. United States Attorney.

(Endorsed:) No. 366. Title of court and cause. Assignments of error. Filed March 23, 1909. A. E. Murphy, clerk. By A. A. Deas, deputy clerk.

548 In the District Court of the United States in and for the District and Territory of Hawaii.

JOHN WYNNE, PLAINTIFF IN ERROR,

*versus*

THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR. }

*Writ of error.*

UNITED STATES OF AMERICA, ss.

*The President of the United States of America to the Honorable Sanford B. Dole, judge of the United States District Court for the Territory of Hawaii, greeting:*

Because in the record and proceedings, as also in the giving, making, rendition, entering, and filing of the final judgment in that certain matter in the aforesaid District Court before you, between the United States of America, plaintiff, being the defendant in error herein, and John Wynne, defendant, being the plaintiff in error herein, manifest errors have happened to the great prejudice and damage of said John Wynne, plaintiff in error, as appears by the petition herein.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid, in this behalf, do command you, if justice be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, in the city of Washington,

549 District of Columbia, together with this writ, so as to have the same at the said place in the said city of Washington, District of Columbia, on the 27th day of May, A. D. 1909, that the said records and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct those errors what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 23rd day of March, A. D. 1909.

Attest my hand and the seal of the United States District Court for the Territory of Hawaii, at the clerk's office at Honolulu, in said Territory, on the day and year last above written.

[SEAL.]

A. E. MURPHY,  
*Clerk of the United States District Court  
for the Territory of Hawaii.*

Allowed this 23rd day of March, A. D. 1909.

S. B. DOLE,  
*Judge of the United States District Court  
for the Territory of Hawaii.*

Service of the above writ, and receipt of a copy thereof, are hereby admitted this 23rd day of March, A. D. 1909.

THE UNITED STATES OF AMERICA,  
*Defendant in error above named.*  
By ROBT. W. BRECKONS,  
*United States Attorney.*

549½ (Indorsed:) 84. No. 366. United States District Court, Territory of Hawaii. John Wynne, plaintiff in error, versus The United States of America, defendant in error. Writ of error. Filed March 23, 1909. A. E. Murphy, clerk.

550 District Court of the United States in and for the District and Territory of Hawaii, special February, A. D. 1909, term.

JOHN WYNNE, PLAINTIFF IN ERROR,	} No. 366. Indictment for murder.
<i>versus</i>	
THE UNITED STATES OF AMERICA, DEFENDANT in error.	

*Order allowing writ of error.*

At a stated term, to wit, the special February, A. D. 1909, term, of the above entitled court, held at its court-room in the city of Honolulu, in the aforesaid district of Hawaii, on the twenty-third day of March, A. D. 1909, present, the Honorable Sanford B. Dole, judge of said court above named.

Upon the petition of C. F. Clemons, esq., one of the attorneys for John Wynne, plaintiff in error, above named.

It is hereby ordered that a writ of error to the United States Supreme Court, at the city of Washington, District of Columbia, from the final judgment heretofore given, made, filed, and entered by the above-named court in the above cause, entitled originally The United States of America, plaintiff, versus John Wynne, defendant, being numbered "No. 366," upon the issues therein joined between the said The United States of America and the above-named John Wynne, defendant and plaintiff in error. under date of November 13,

A. D. 1908, be and the same is hereby allowed, and that a certified transcript of the record, stipulations, and all proceedings herein be forthwith transmitted to the United States Supreme Court.

Dated Honolulu, Hawaii, March 23rd, A. D. 1909.

(Sgd.) S. B. DOLE,  
*Judge, U. S. District Court.*

551 Due service of the above order, and receipt of a copy thereof, are hereby admitted this 23rd day of March, A. D. 1909.

THE UNITED STATES OF AMERICA,  
By ROBT. W. BRECKONS,  
*United States Attorney.*

(Endorsed:) No. 366. Title of court and cause. Order allowing writ of error. Filed March 23, 1909. (Sgd.) A. E. Murphy, clerk.

552 In the District Court of the United States in and for the District and Territory of Hawaii.

JOHN WYNNE, PLAINTIFF IN ERROR,

*versus*

THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR. }

*Citation.*

UNITED STATES OF AMERICA, ss:

*The President of the United States of America to the United States of America, and to its counsel, greeting:*

You and each of you are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington in the District of Columbia, within sixty (60) days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the above named District Court of the United States in and for the Territory and District of Hawaii, wherein John Wynne is plaintiff in error and you are defendant in error, to show cause, if any there be, why the final judgment in said writ of error mentioned, and from which said writ of error had been allowed, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 23rd day of March, A. D. 1909, and of the independence of the

553 United States of America the one hundred and thirty-third.

S. B. DOLE,  
*Judge United States District Court  
for the Territory of Hawaii.*

Attest:

[SEAL.]

A. E. MURPHY,  
*Clerk United States District Court  
for the Territory of Hawaii.*

Due service of the foregoing citation and receipt of a copy thereof are hereby admitted this 23rd day of March, A. D. 1909.

THE UNITED STATES OF AMERICA,  
By ROBT. W. BRECKONS,  
*United States District Attorney.*

553½ (Indorsed:) 87. No. 366. United States District Court, Territory of Hawaii. John Wynne, plaintiff in error, versus The United States of America, defendant in error. Citation. Filed March 23, 1909. A. E. Murphy, clerk.

554 In the District Court of the United States in and for the District and Territory of Hawaii.

JOHN WYNNE, PLAINTIFF IN ERROR,  
*versus*  
THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR. }

*Order as to transmission of exhibit.*

It appearing necessary to the fair consideration of the above entitled cause on writ of error herein to this United States District Court for the Territory of Hawaii from the Supreme Court of the United States, that exhibit numbered 2 of the United States of America, defendant in error herein, being, to wit, a certified copy of the enrollment or registration of the steamship "Rosecrans," be transmitted to said Supreme Court with the record on said writ of error.

It is hereby ordered that said exhibit numbered 2 be transmitted by the clerk of this United States District Court for the Territory of Hawaii to the Supreme Court of the United States, together with the record which is to be transmitted by said clerk to said Supreme Court.

And it is further ordered that unless said Supreme Court shall otherwise order, the said exhibit shall, upon the final determination of said writ of error, be returned to this United States District Court by the clerk of said Supreme Court.

Done at Honolulu, this 23rd day of March, A. D. 1909.

S. B. DOLE.  
*Judge U. S. District Court.*

555 Due service of the above order, and receipt of a copy thereof are hereby admitted this 23rd day of March, A. D. 1909.

THE UNITED STATES OF AMERICA,  
*Defendant in error above named.*  
By ROBT. W. BRECKONS,  
*United States Attorney.*

555½ (Indorsed:) 85. No. 366. United States district court, Territory of Hawaii. John Wynne, plaintiff in error, versus the United States of America, defendant in error. Ordered as to



transmission of exhibit. Filed March 23, 1909. A. E. Murphy, clerk.

556 In the United States District Court for the Territory of Hawaii.

JOHN WYNNE, PLAINTIFF IN ERROR,

*versus*

THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

*Praeceptum for Transcript.*

*To the clerk of the above-entitled court:*

You will please prepare transcript of the record in this cause (the same being originally entitled, The United States of America, plaintiff, vs. John Wynne, defendant, No. 366) to be filed in the office of the clerk of the United States Supreme Court, under the writ of error heretofore sued out and perfected to said court, and include in said transcript the following pleadings, proceedings, and papers on file, to wit:

1. Indictment.
2. Demurrer to indictment.
3. Motion to compel election.
4. Ruling on motion to compel election.
5. Instructions requested by prosecution.
6. Instructions requested by defense.
7. The court's charge to jury.
8. Exceptions of defendant to charge to jury.
9. Motion for directed verdict.
- 9A. Verdict.
10. Motion in arrest of judgment.
11. Judgment and sentence.
12. Motion of defendant for allowance of 60 days to prepare
- 557 and file bill of exceptions and petition for writ of error.
13. Stipulation allowing time aforesaid.
14. Order allowing time aforesaid.
15. All minute entries of the clerk of proceedings in said original cause No. 366 and in said cause on petition for writ of error.
16. The minutes of the official stenographer of proceedings therein on arraignment and plea, to wit, November 11, 1907.
17. The minutes of the official stenographer of proceedings therein on filing of demurrer, to wit, December 2, 1907.
18. The minutes of the official stenographer of proceedings therein at decision on demurrer, to wit, December 14, 1907.
19. The minutes of the official stenographer of proceedings therein upon filing motion to compel election, to wit, December 18, 1907.
20. The minutes of the official stenographer of proceedings therein on ruling on motion to compel election, to wit, January 25, 1908.
21. The minutes of the official stenographer of proceedings therein on motion to elect, to wit, February 24, 1908.

22. The minutes of the official stenographer of proceedings therein on submission of case to jury and instructions and charge and on return of verdict, to wit, November 9, 1908.

23. The minutes of the official stenographer of proceedings therein at sentence and judgment, to wit, November 13, 1908.

24. The minutes of the official stenographer of proceedings therein on presenting and allowance of bill of exceptions and on petition for writ of error, to wit, March 23, 1909.

558 25. The defendant's bill of exceptions with transcript of testimony made a part thereof.

26. Petition for writ of error, and 26A notice thereof.

27. Assignment of errors.

28. Writ of error.

29. Order allowing writ of error.

30. Citation.

31. Order as to transmission of exhibit.

32. Order extending time to transmit record on writ of error.

33. This praecipe.

Said transcript to be prepared as required by law and the rules of this court and the rules of the Supreme Court of the United States, and filed in the office of the clerk of the Supreme Court of the United States at Washington, District of Columbia, before May 22nd, A. D. 1909.

Dated Honolulu, March 23, 1909.

JOHN WYNNE,

*Plaintiff in error.*

By THOMPSON & CLEMONS,

*His attorneys.*

(Endorsed:) No. 366. Title of court and cause. Praecipe. Filed Mar. 25, 1909. (Sgd.) A. E. Murphy, clerk.

559 In the United States District Court for the Territory of Hawaii.

*Clerk's certificate to transcript of record.*

UNITED STATES OF AMERICA,

*Territory of Hawaii, ss.*

I, A. E. Murphy, clerk of the United States District Court for the Territory of Hawaii, do hereby certify that the foregoing pages numbered from 1 to 155, inclusive, contained in volume 1, and the foregoing pages numbered from 156 to 559, inclusive, contained in volume 2, is a true and complete transcript of the record and proceedings had in said court in the cause of the United States of America *vs.* John Wynne, as the same remains of record and on file in my office; and I further certify that I hereto annex the original writ of error, citation, and order extending time to transmit record on writ of error.

I further certify that all costs required of the appellant, John Wynne, in and by the said United States District Court have been paid.

In witness whereof, I have hereunto set my hand and affixed the seal of this court, this 24th day of April, A. D. 1909.

[SEAL.]

A. E. MURPHY,  
*Clerk.*

560 (Indorsement on cover:) File No. 21,659. Hawaii Territory D. C. U. S. Term No. 449. John Wynne, plaintiff in error, vs. The United States. Filed May 10th, 1909. File No. 21,659.

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# In the Supreme Court of the United States.

OCTOBER TERM, 1909.

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JOHN WYNNE, PLAINTIFF IN ERROR,	} No. 449.
v.	
THE UNITED STATES.	

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## MOTION TO ADVANCE.

Plaintiff in error was indicted in the District Court of the United States for the Territory of Hawaii on October 25, 1907, for the murder of Archibald F. McKinnon, alleged to have been committed in the harbor of Honolulu, within the jurisdiction of the court and within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, on board of an American vessel, the *Rosecrans*, belonging to the National Oil and Transportation Company, a corporation organized under the laws of the State of California. He was tried on November 9, 1908, and found guilty as indicted, and was sentenced to be hanged.

In accordance with the provisions of rule 26, section 3, the Solicitor-General moves the court to

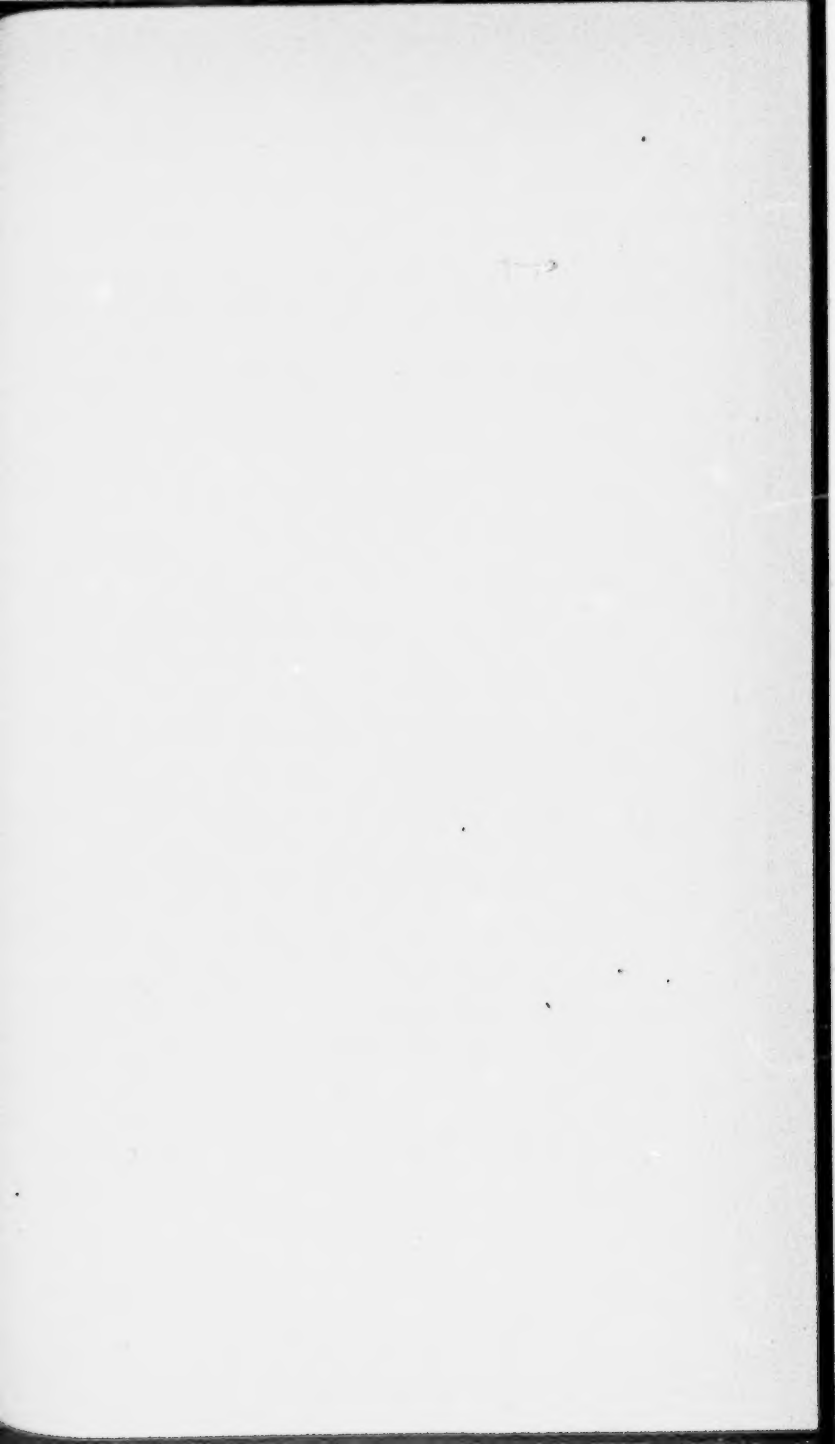
advance the case and set it down for hearing on a day convenient to the court.

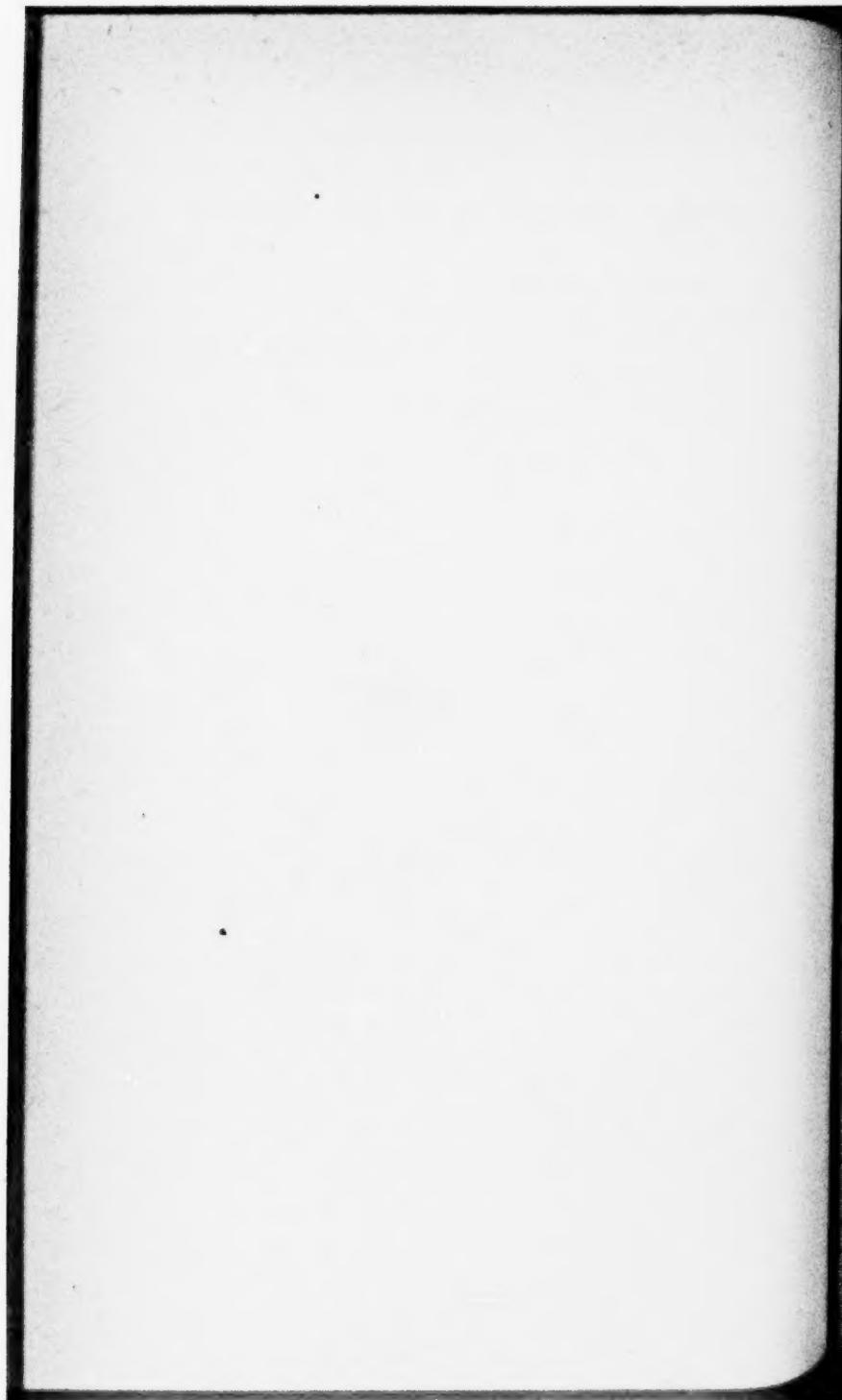
Notice of this motion has been served upon opposing counsel.

LLOYD W. BOWERS,  
*Solicitor-General.*

NOVEMBER, 1909.

O







(27,533)

AMERICAN BAR ASSOCIATION

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1908

No. 449

JOHN WYNNE,

*Plaintiff in Error,*

vs.

THE UNITED STATES OF AMERICA,

*Defendant in Error.*

## Brief for Plaintiff in Error.

IN ERROR TO THE UNITED STATES DISTRICT COURT FOR THE  
TERRITORY OF HAWAII.

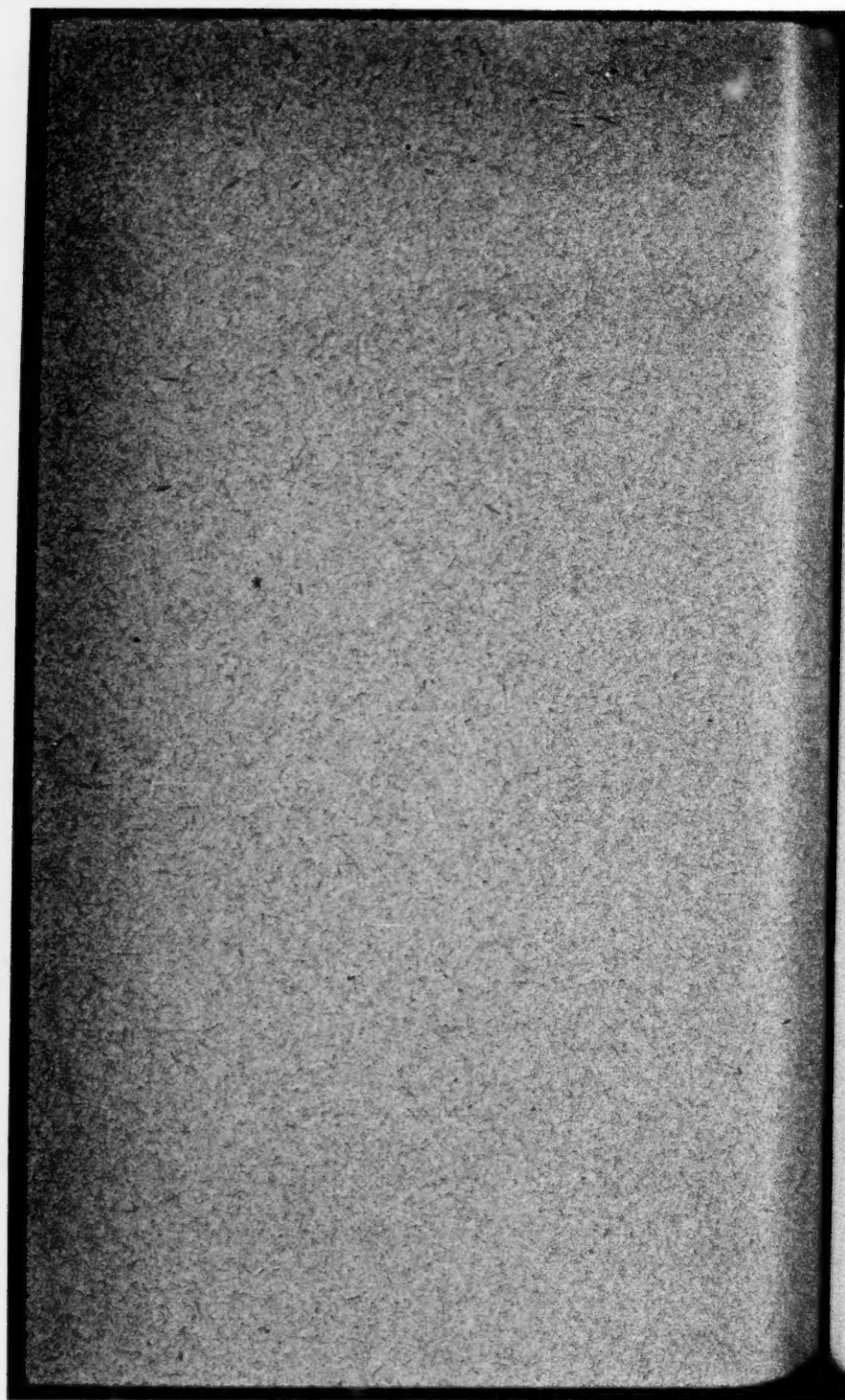
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(21,659)

# In the Supreme Court of the United States

OCTOBER TERM, 1909

No. 449

JOHN WYNNE,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

In Error to the United States District Court for the  
Territory of Hawaii.

## BRIEF FOR PLAINTIFF IN ERROR.

### STATEMENT OF THE CASE.

This cause is here on writ of error to the United States District Court for the Territory of Hawaii. It had its origin in an indictment of six different counts charging the plaintiff in error with the murder of Archibald F. McKinnon in and on board of an American vessel, the "Rosecrans", belonging to the National Oil and Transportation Company, a California corporation; these counts differing, in respect to (1) where the felonious act is alleged to have been committed, and (2) where the death occurred, all as shown by the following summary (the first two counts, alleging an act on the high seas,

being omitted as not having been relied upon at the trial by the defendant in error who then and there elected to rely on the last four counts: Transcript of Record, hereinafter designated by the abbreviation, "Tr.," pp. 64, 81):

Third count: "in a certain haven of the Pacific Ocean, to-wit, the harbor of Honolulu, in the District and Territory of Hawaii, and within the jurisdiction of this Court [the United States District Court for the Territory of Hawaii] and within the admiralty and maritime jurisdiction of the said United States of America, and out of the jurisdiction of any particular State of the said United States of America", so that the deceased then and there in said haven and on board of said vessel, and out of the jurisdiction of any particular State, instantly died (Tr., p. 5).

Fourth count: In a certain haven of the Pacific Ocean, to-wit, the harbor of Honolulu, in the District and Territory of Hawaii, and within the jurisdiction of this [said District] Court and within the admiralty and maritime jurisdiction of the said United States of America, and out of the jurisdiction of any particular State of the said United States of America"; so that the deceased, thereafter, languishing died "on the Island of Oahu, at and within the said Territory and District of Hawaii." (Tr., p. 7.)

Fifth count: "in a certain arm of the Pacific Ocean, to-wit, the harbor of Honolulu, in the District and Territory of Hawaii, and within the jurisdiction of this [afore-said District] Court and within the admiralty and maritime jurisdiction of said United States of America, and out of the jurisdiction of any particular State," so that the deceased then and there in said haven and on board of said vessel and out of the jurisdiction of any particular State, instantly died (Tr., p. 8).

Sixth count: "in a certain arm of the Pacific Ocean, to-wit, the Harbor of Honolulu, in the District and Territory of Hawaii, and within the jurisdiction of this [aforesaid District] Court and within the admiralty and maritime jurisdiction of the said United States of America, and out of the jurisdiction of any particular State," so that the deceased, thereafter, languishing, died "on the Island of Oahu, at and within the said Territory and District of Hawaii." (Tr., p. 9.)

Or, more briefly, the counts of the indictment upon which the defendant in error elected to rely, allege:

(1) Both the act committed and the death resulting, in a haven of the Pacific Ocean, and without the jurisdiction of any particular State (Third count);

(2) The act committed in such haven without the jurisdiction of any particular State, but the death resulting on the Island of Oahu and within the jurisdiction of the Territory of Hawaii (Fourth count);

(3) Both the act committed and the death resulting in an arm of the Pacific Ocean and without the jurisdiction of any particular State (Fifth count):

(4) The act committed in such arm of the sea but the death resulting on the Island of Oahu and within the jurisdiction of the Territory of Hawaii (Sixth count).

The questions here involved are reducible to questions of jurisdiction. They are directly raised by a Demurrer to the Indictment (Tr., pp. 12, 78-79, Exceptions 2, 3, 4, 5), wherein the "Third," "Fourth," "Fifth," and "Sixth" counts aforesaid are contended not to constitute a crime or offence within, under, or against the laws of the United States; (2) by a Motion for a Directed Verdict, expressly denying jurisdiction (Tr., pp.

24, 92, Exception 18); (3) by said Motion, contending that there was no proof that the acts charged were committed outside of any State, but that the testimony showed the acts charged to have been committed in the Territory of Hawaii and within a State as the term "State" is known to the law (Tr., p. 101, Exceptions 23, 24); (4) by a Motion in Arrest of Judgment, expressly denying jurisdiction (Tr., pp. 55, 119, Exception 48), and (5) by said Motion in Arrest, contending that the acts charged do not constitute an offense against the laws of the United States (Tr., p. 119, Exception 49).

And the question of jurisdiction is raised also in an attack upon the sufficiency of the evidence (1) by a Motion for Directed Verdict (Tr., pp. 24, 97-101, Exceptions 21, 22, 23), attacking the verdict for want of proof that the alleged act was committed outside of any State (grounds 4-5, 6-7, of the Motion, Tr., pp. 24-25), and (2) by an exception to the verdict as contrary to the evidence and the weight of the evidence (Tr., p. 117, Exception 46), and (3) by an exception to the overruling of a Motion for Directed Verdict (Tr., pp. 55-56, 119-120, Exception 51).

And the jurisdictional question is raised also by exceptions taken to the Court's refusal to give certain instructions asked by the defendant, and to the Court's giving of certain instructions asked by the plaintiff, (Tr., p. 111, Exception 40; Tr., p. 295).

### ASSIGNMENTS OF ERROR.

The plaintiff in error relies upon the following assignments of error (the numbers being the same as those of the assignments originally filed herein, Tr., pp. 279-302, and the missing numbers being those of assignments which have been abandoned):

## 1.

The said District Court erred in overruling the Demurrer to the Indictment.

And the grounds of said assignment of error are:

(a) That said indictment does not state facts sufficient to constitute a crime or offense within, under, or against the laws of the United States;

(b) That no count of said indictment states facts sufficient to constitute a crime or offense, within, under, or against the laws of the United States;

(c) That the several counts of said indictment are inconsistent with each other;

(d) That there is a variance between the several counts of said indictment;

(e) That the said Court is and was at all times herein without jurisdiction to try the defendant (plaintiff-in-error) for any act set forth in said indictment.

## 2.

The said Court erred in overruling ground numbered "3" of the said Demurrer and in holding that the "Third Count" of said Indictment states facts sufficient to constitute a crime or offense within, under, or against the laws of the United States.

And the grounds of said assignment of error are:

(a) That the "Third Count" aforesaid does not state facts sufficient to constitute a crime or offense, within, under, or against the laws of the United States;

(b) That the said court is and was at all times herein without jurisdiction to try the defendant for any act set forth in said "Third Count";



## 3.

The said Court erred in overruling ground numbered "4" of said demurrer and in holding that the "Fourth Count" of said Indictment states facts sufficient to constitute a crime or offense within, under, or against the laws of the United States.

And the grounds of said assignment of error are:

(a) That the "Fourth Count" aforesaid does not state facts sufficient to constitute a crime or offense within, under, or against the laws of the United States;

(b) That the said Court is and was at all times herein without jurisdiction to try the defendant for any act set forth in said "Fourth Count";

## 4.

The said Court erred in overruling ground numbered "5" of the said Demurrer, and in holding that the "Fifth Count" of said Indictment states facts sufficient to constitute a crime or offense within, under, or against the laws of the said United States.

And the grounds of said assignment of error are:

(a) That the "Fifth Count" aforesaid does not state facts sufficient to constitute a crime or offense within, under, or against the laws of the United States;

(b) That the said Court is and was at all times herein without jurisdiction to try the defendant for any act set forth in said "Fifth Count".

## 5.

The said Court erred in overruling ground numbered "6" of said Demurrer and in holding that the "Sixth Count" of said Indictment states facts sufficient to constitute a crime within, under, or against the laws of the United States;

And the grounds of said assignment in error are:

(a) That the "Sixth Count" aforesaid does not state facts sufficient to constitute a crime or offense within, under, or against the laws of the United States;

(b) That the said Court is and was at all times herein without jurisdiction to try the defendant for any act set forth in said "Sixth Count".

17.

The said Court erred in denying the Defendant's Motion for Directed Verdict;

And the grounds of error are:

(a) That the said Court was at all times herein without jurisdiction to try the defendant for any act set forth in the said Indictment;

(b) That the evidence in said cause is only that the act or acts charged in said Indictment was or were committed on a vessel moored at and tied to a wharf in the Harbor of Honolulu and not on the high sea or high seas;

(c) That there is no proof or evidence, or anything to show, in said cause that the act or acts charged against the defendant was or were committed outside of any State as "State" is defined by or known to the law;

(f) That the proof or evidence in said cause shows that the act or acts here charged was or were committed in the Territory of Hawaii and within a State as the term "State" is known to the law;

18.

The said Court erred in denying the said Motion for Directed Verdict, and in holding adversely to ground numbered "1" thereof, that said Court had jurisdiction to try the defendant for any act set forth in said Indictment.

## 19.

The said Court erred in denying the said Motion for Directed Verdict, and in not sustaining Ground numbered "2" thereof, namely: that there is no evidence or proof in said cause that the act or acts charged against the defendant in said Indictment was or were committed on the "high seas."

## 20.

The said Court erred in denying the said Motion for Directed Verdict, and in not sustaining ground numbered "3" thereof, namely: that the evidence in said cause was only that the act or acts charged in said Indictment against the defendant was or were committed only on a vessel moored at and tied to a wharf in the Harbor of Honolulu, and not on the "high sea" or "high seas."

## 23.

The said Court erred in denying the said Motion for Directed Verdict and in not sustaining ground numbered "6" thereof; namely: that there was no proof or evidence, or anything herein to show, that the act or acts charged against the defendant was or were committed outside of any State as State is defined by or known to the law.

## 24.

The Court erred in denying the said Motion for Directed Verdict and in not sustaining Ground numbered "7" thereof, namely, that the proof or evidence in said cause shows that the act or acts in said cause charged was or were committed in the Territory of Hawaii, and within a State as the term "State" is known to the law.

39.

The said Court erred in refusing to give Defendant's Requested Instruction No. 27, which is as follows, to-wit:

I instruct you that in order to find the defendant guilty of any crime of homicide, it is necessary that the act or acts here charged should have been committed outside of any state, which term state, includes, not only states admitted to the Union of States known as the United States, but it includes also an organized Territory such as the Territory of Hawaii; I therefore instruct you that unless you find that the act or acts here charged were committed outside of the Territory of Hawaii, you cannot find the defendant guilty.

40.

The said Court erred in giving the following Instruction during the course of its Charge to the Jury, to-wit:

I instruct you that the harbor of Honolulu is a haven or an arm of the Pacific Ocean, and that the waters of Honolulu Harbor are within the admiralty and maritime jurisdiction of the United States, and that the harbor of Honolulu is without the jurisdiction of any particular state.

And the grounds of said assignment of error are:

(a) That the said Court had and has no jurisdiction over crimes or offenses committed in the Harbor of Honolulu;

(b) That the Harbor of Honolulu is not without the jurisdiction of any particular state, as the term "State" is known to the law.

The jury in said cause erred in returning its verdict finding the defendant guilty of murder as charged in said Indictment;

And the grounds of said assignment of error are:

(a) That said verdict was and is contrary to the law in said cause;

(b) That said verdict was and is contrary to the evidence in said cause;

(c) That said verdict was and is contrary to the weight of the evidence in said cause.

The said Court erred in overruling and denying the Defendant's Motion in Arrest of Judgment filed in said cause;

And the grounds of said assignment of error are:

(a) That the said Court is and was at all times herein without jurisdiction to try the defendant for any act set forth in said Indictment or for any act set forth in any count thereof;

(b) That the facts stated in said Indictment do not constitute any crime or offense within, under, or against the laws of the United States;

(c) That the facts stated in each of the several counts of the said Indictment do not constitute any crime or offense within, under, or against the laws of the United States;

(d) That the facts stated in the "Third Count" of said Indictment do not constitute any crime or offense within, under, or against the laws of the United States;

(e) That the facts stated in the "Fourth Count" of

said Indictment do not constitute any crime or offense within, under, or against the laws of the United States;

(f) That the facts stated in the "Fifth Count" of said Indictment do not constitute any crime or offense within, under, or against the laws of the United States;

(g) That the facts stated in the "Sixth Count" of said Indictment do not constitute any crime or offense within, under, or against the laws of the United States;

(i) That no judgment against the defendant can be lawfully rendered on the record herein;

(j) That no judgment against the defendant can be lawfully rendered on the evidence herein.

## 48.

The said Court erred in overruling and denying said Motion in Arrest of Judgment and in refusing to grant said Motion on Ground numbered "1" thereof, that "this Court is and was at all times herein without jurisdiction to try the said defendant for any act set forth in the Indictment or for any act set forth in any count thereof."

## 49.

The said Court erred in overruling and denying said Motion in Arrest of Judgment and refusing to grant said Motion on Ground numbered "2" thereof, that "the facts stated in said Indictment or in any count thereof do not constitute an offense against the laws of the United States.

## 51

The said Court erred in overruling and denying said Motion in Arrest of Judgment and refusing to grant said Motion on Ground numbered "4" thereof, that "no judgment can be lawfully rendered on the record herein."

## ARGUMENT.

**THE TRIAL COURT WAS WITHOUT JURISDICTION (a) OF ANY ACT ALLEGED IN THE INDICTMENT, AND (b) OF ANY ACT PROVED TO HAVE BEEN COMMITTED.**

Under this Indictment, it is attempted to prosecute the defendant for violation of Section 5339 of the Revised Statutes, which provides:

“Every person who commits murder—

“First. Within any fort, arsenal, dock-yard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States;

“Second. Or upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State;

“Third. Or who upon any such waters maliciously strikes, stabs, wounds, poisons, or shoots at any other person, of which striking, stabbing, wounding, poisoning, or shooting such other person dies, either on land or at sea, within or without the United States, shall suffer death.”

The justification for the Indictment must be found, if at all, in the provisions of section 5 of the Act to Provide a Government for the Territory of Hawaii (hereinafter referred to as the “Organic Act”), by which in a general way the laws of the United States are extended to the Hawaiian Islands:



"That the Constitution, and, except as herein otherwise provided, all the laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States."

31 Stat. L. 141, Act Apr. 30, 1900, ch. 339, s. 5.

3 Fed. Stat. Annotated, 187.

This section of the Organic Act has, however, an important qualification not only in its own terms by reason of the use of the words "except as herein otherwise provided" and by the use of the words "not locally inapplicable," but also in the terms of the very next section of the Act, providing:

"That the laws of Hawaii not inconsistent with the Constitution or laws of the United States or the provisions of this Act shall continue in force, subject to repeal or amendment by the Legislature of Hawaii or the Congress of the United States."

Organic Act, s. 6,

31 Stat. L, 141,

3 Fed. Stat. Annotated, 188.

In annexing the Hawaiian Islands Congress recognized the historical facts, of which this Court would have judicial knowledge, that Hawaii at that time had for over fifty years had a judicial system closely patterned after that of the "common-law" States, particularly Massachusetts, with courts of law and equity, and had then published some twelve volumes of reports of decisions of its highest judicial tribunal, that it for many years had enjoyed some measure of constitutional government, and at the time of annexation was a republic with a very liberal elective franchise and a constitution as liberal as that of the United

States in its guaranty of rights and of protection to persons and property.

See Civil Laws, 1897, Hawaii, Ballou's compilation, pp. 1 *et seq.*,

Compiled Laws, 1884, Hawaii, pp. 214 *et seq.*

The Compiled Laws of 1884 refer also in a foot note at page 214 to a constitution of 1864, thirty-five years before annexation.

And it is especially important to note that, when annexed, Hawaii had not only these advantages of full-fledged, organized government, but also as complete a system of statute law as is afforded by the average American State, or indeed by the older States, for instance the States of New England. Congress found Hawaii with a system of civil and penal laws so excellent that, with a few exceptions including for instance the subjects of post-office, coinage, customs, internal revenue, manufacture of liquors, immigration, navigation, and maritime matters, which must necessarily be the direct care of the Federal Government itself, the national legislature expressly left that system of Hawaiian laws in force and effect. The compilations of Hawaiian statutes referred to in Section 1 of the Organic Act included the Civil Laws of 831 pages and the Penal Laws of 549 pages exclusive of tables of contents and indices.

And among the statutes so preserved and continued in force are those relating to homicide and punishing murder.

Organic Act, s. 6,

Penal Laws, 1897, Hawaii, pp. 62-64,

Revised Laws, 1905, Hawaii, pp. 1074-1076.

And not only were the laws relating to homicide expressly continued in force by the general terms of Section 6 of the Organic Act, but they were also by the strongest implication continued in force by reason of the

repealing clause of the Organic Act, section 7, which, in specifying just what Hawaiian statutes are not to be continued in force, fails to designate the chapter of the Penal Laws of 1897 relating to homicide. *Expressio unius exclusio alterius*.

There was not then the same reason for having the Territory of Hawaii governed by what we may call Federal "municipal" laws or laws in the nature of *police* regulations, that there would be with regard to territories such as was Alaska, or Arizona, or New Mexico, *at the time of annexation*. But Hawaii, when annexed, already had, for instance, statutory provisions against homicide, as full and effective as those of the oldest American States. When annexed, Alaska had not such laws, neither had Arizona nor New Mexico. Hawaii was already an organized state; Alaska, Arizona, New Mexico, and Oregon, when made territories, were without organized government or systems of law and required such at the hands of Congress. And Congress not only recognized these facts, but in the Organic Act expressed its recognition of existing conditions by treating Hawaii not as an ordinary Territory but, so far as possible, as a State. Thus, its provisions for the Hawaiian judiciary were so different from those ordinarily enacted for territories, that this Court in several cases has held the relations between the United States District Court for the District of Hawaii and other Federal Courts on the one hand and the Hawaiian Territorial Courts on the other to be similar to those between Federal and State Courts.

See *Equitable L. A. Co. v. Brown*, 187 U. S. 309;  
47 L. ed. 191,

*Ex p. Wilder's S. S. Co.*, 183 U. S. 545; 46 L.  
ed. 321,

*Territory of Hawaii v. Carter*, 19 Haw. 198,  
200, 201, (advance sheets),

*Territory of Hawaii v. Martin*, 19 Haw. 201,  
202-205, 213-214 (advance sheets),  
*Territory of Hawaii v. Morita Keizo*, 17  
Haw. 297-299,  
*Bierce v. Hutchins*, 18 Haw. 518.

That the statements which we have just made are not mere argument, may be seen by reference to the report of the Wilder's Steamship Company case, 187 U. S. at p. 547, wherein Mr. Justice Gray states as a fact that "the Republic of Hawaii, before its annexation to the United States, had a fully organized government."

The language of Mr. Justice Ballou in the case of *Territory v. Martin*, 19 Haw 201, at page 214 (advance sheets) strongly emphasizes the point which we urge above:

"The inference is almost irresistible that Sec. 7 contains all the Hawaiian laws which congress intended to designate as inconsistent with the laws of the United States, and that in view of the retention of the local Hawaiian tribunals to deal with local law and the establishment of a separate United States district court to deal with federal questions, congress did not consider as inconsistent the retention on the statute books of local laws upon subjects covered by federal statutes, even though the local law was to be administered by different tribunals and might result in different penalties. This view is somewhat strengthened by the inadequacy of the machinery bestowed upon the federal court upon the supposition that it was to do the police work of the entire Territory in regard to offenses against morality, to say nothing of murder, manslaughter and every other crime punishable under a United

States statute. The question being one of statutory construction it appears clear that the local statute under which the defendant was convicted is in force."

It may be said that in this decision all that was necessary to be determined was whether the courts of the Territory had jurisdiction, regardless of whether the Federal courts also had concurrent jurisdiction, of the particular crime there in question; but, we assert, the opinion of the Court is clearly apparent in favor of our contention.

And Congress manifests its intent not alone in sections 5, 6, and 7 of the Organic Act but also in other places, as, for example, in section 81 relating to the judiciary wherein it provides:

"That the judicial power of the Territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish. And until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the several courts and their *jurisdiction* and procedure *shall continue in force* except as herein otherwise provided;"

also in section 83, wherein it provides:

"That the laws of Hawaii relative to the judicial department, including civil and *criminal* procedure, except as amended by this Act, are continued in force, subject to modification by Congress, or the legislature,"

also in section 86 relating to the Federal district court, as amended by Act of March 3, 1909, ch. 269, 35 Stat. L. 838, wherein it provides:

“Writs of error and appeals from the said district court shall be had and allowed to the circuit court of appeals for the ninth judicial circuit in the same manner as writs of error and appeals are allowed from circuit courts to circuit courts of appeal as provided by law, and appeals and writs of error may be taken to the Supreme Court of the United States from said district court in cases where appeals and writs of error are allowed from the district and circuit courts of the United States to the Supreme Court, and the laws of the United States relating to juries and jury trials shall be applicable to said district court. The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several *States* shall govern in such matters and proceedings as between the courts of the United States and the courts of the *Territory of Hawaii*,”

also in section 73, wherein, instead of applying the usual Federal laws pertinent to the subject,

“The laws of Hawaii relating to public lands, the settlement of boundaries, and the issuance of patents on land-commission awards, except as changed by this Act, [are] continue[d] in force until Congress shall otherwise provide;”

and also in section 75, wherein the office of superintendent of public works is continued in existence as are also his “powers and duties” and those of the minister of the interior and other officers under the former government of Hawaii, relating to:

“harbor improvements, wharves, landings, \* \*

and other grounds and lands now under the control and management of the minister of the interior and those of the powers and duties of the minister of finance and collector general which relate to *pilots* and *harbor* masters under the laws of Hawaii, except as herein changed by this Act, and subject to modification by the legislature."

And by section 89 of the Organic Act it is provided that:

"The *wharves* and *landings* constructed or controlled by the Republic of Hawaii on any seacoast, bay, roadstead, or harbor shall remain under the control of the government of the Territory of Hawaii;"

while by section 91 of the Act it is provided that:

"the public property ceded and transferred to the United States by the Republic of Hawaii \* \* \* shall be and remain in the possession, use, and *control* of the government of the Territory of Hawaii, and shall be maintained, managed, and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President, or of the Governor of Hawaii."

Moreover, the very first provision of the Organic Act, after the necessary foundation enactment designating the Hawaiian Islands as "the Territory of Hawaii" and establishing a Territorial government, was to declare:

"That all persons who were citizens of the Republic of Hawaii on August 12, 1898, are . . . to be citizens of the United States." . . .

Organic Act, s. 4.

Such action is quite different from the attitude exhib-



ited by Congress toward any other Territory on its annexation.

It is clear, then, that the Territory of Hawaii was placed on a more independent basis than is usually the case with territories upon annexation, and on a basis as nearly similar to a State of the Union as was possible.

And at this point, we may confidently assert, there can be no doubt of the jurisdiction of the courts of the Territory over the crime of murder as defined by Hawaiian statutes.

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The next question is whether, even if the courts of Hawaii have jurisdiction, the Federal court has not also *concurrent* jurisdiction; and this must be answered by considering the words "out of the jurisdiction of any particular State" as these words are used in the Federal statute relating to murder (R. S., s. 5339), for it is by virtue of these words, if at all, that the Federal court obtains any jurisdiction of the acts here charged against the defendant.

Now, if we are to construe the words "out of the jurisdiction of any particular State" in a narrow sense, as meaning "out of the jurisdiction of any particular State of the Union," as such State is distinguished from territories, (*i. e.* organized territories), or possessions unorganized, of the United States of America, and so, if we are to regard the Federal court as having jurisdiction because of the fact that Hawaii, not being such a State, an act committed therein is committed in a place "out of the jurisdiction of any particular State," then, by the same reasoning, the government, defendant-in-error, must also admit the conclusion that the Federal court would have jurisdiction of murder no matter where committed in the Territory of

Hawaii and "out of the jurisdiction of any particular State," not only murder committed in the harbor of Honolulu, or at a wharf on the sea-coast of Hawaii, or on any shore thereof either on the sea, on an arm of the sea, or on a river or creek, but also murder committed in the body of the Territory anywhere inland.

In other words, any such reasoning must lead to the inevitable conclusion that Congress intended the Federal government to charge itself directly with matters of police regulation, in the case of murder at least, not only as to the harbor of Honolulu and the wharves, rivers, havens, and creeks throughout the Territory, but as to any and every place within the Hawaiian Islands.

These observations are made to show the unreasonableness, if not absurdity, of any contention that the Federal court by virtue of Revised Statutes, s. 5339, has jurisdiction concurrently with the jurisdiction which the Territorial courts acquired by virtue of the provisions of the Organic Act, above pointed out, continuing in force the penal laws of Hawaii relating to homicide.

But Congress having, as we have shown at length, given Hawaii the fullest measure of home-rule, it is not reasonable to suppose that the intention was to burden the Federal District Court in Hawaii with such a matter of police regulation as the subject of murder, wherever committed in the Territory. If it were reasonable to suppose that Congress intended to give the Federal Court such jurisdiction, while also continuing in force the jurisdiction of the Hawaiian courts in case of murder, then also we must suppose that Congress intended to give the Federal court jurisdiction of manslaughter (see Rev. Stat., s. 5342), of rape (Rev. Stat., s. 5345), of assault and battery (Rev. Stat., s. 5346), although the penal laws of Hawaii were continued in force by the Organic Act (s. 6), and not repealed

thereby (s. 7). Such a view would place the Federal court for the District of Hawaii on a level with police courts. See the last three references to the Revised Statutes wherein the words "outside of the jurisdiction of any particular State" are used precisely as in the section relating to murder.

At this point, then, we may also assert with confidence that there can be no reasonable doubt that Congress intended to leave the jurisdiction of the crime of murder, as of the crimes of manslaughter, rape, and assault and battery and other crimes which originated as common-law offenses, just where it had always been before annexation, *i. e.*, in the Hawaiian courts, whose existence was continued by sections 81 and 82 of the Organic Act (and see Revised Laws, 1905, Hawaii, ch. 112, 113, which compare with Civil Laws, 1897, Hawaii, ch. 80, 81).

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Our contention against the jurisdiction of the Federal court is, of course, unanswerable if the word "State" be construed in its broader meaning of, any separate political community. Such broader meaning is, we contend, the general signification of the word "State," and so it was construed in reference to the Territory of Montana, in the case of *Talbot v. Silver Bow County*, 139 U. S. 438, 444, 35 L. ed. 210, 211, 212, wherein Mr. Justice Brewer declined to regard the strict "letter" of the law.

See, also, *The Ullock*, 19 Fed. 297, 212,  
*Neill v. Wilson*, 12 Pac. 810,  
*Id.*, 14 Ore. 410.

"While the word 'State' is often used in contradistinction to 'Territory,' yet *in its general public sense*, and as sometimes used in the statutes and the proceedings of the government, it has the larger meaning of any separate political community, including therein the District of Columbia and the Territories, as well as those political communities known as States of the Union. Such a use of the word 'State' has been recognized in the decisions of this Court."

*Talbot v. Silver Bow County, supra.*

See *De Geoffrey v. Riggs*, 133 U. S. 258,

*Id.*, 33 L. ed. 642.

While some of these cases, as the one last cited, are cases of special application, still the general principle obtains that unless there is something to require a narrow construction of the word State when used in our statutes, it should be given a broad and liberal meaning, in order to effect a reasonable construction, and to carry out the reason and spirit of the law.

In this connection, it may be said, by way of argument in anticipation, that the fact that the word "State" is required to be construed in a narrow sense as used in some places in the Constitution of the United States, is not a controlling, or even persuasive, factor in construing the word as used in a particular statute; unless, of course, the statute deals with some subject which relates to States within the meaning of that word as used in its narrow sense in the Constitution.

In considering whether the statute was enacted with a view only to "States" of the Union, we should regard those cardinal criteria of statutory construction, What was the reason and spirit of the statute? What was the mischief

against which it was directed? What was the remedy intended to be secured? The reasonable conclusion is that by the use of the words "out of the jurisdiction of any particular State," it was intended to provide a means of punishment where no such means were afforded; that it was thereby intended to give jurisdiction to the Federal court in cases where the judicial bodies of the particular State (*i. e.*, political community, including Territory,) were not invested with jurisdiction in the premises.

Such was the view of this Court in the case of *United States v. Bevans*, 3 Wheat. 337, 4 L. ed. 404, which held: that admitting Article 3 of the Constitution, which declares the judicial power to extend to "all cases of admiralty jurisdiction," to have vested in the United States exclusive jurisdiction of all such cases, and admitting that a murder committed in the waters of a State where the tide ebbs and flows, is a case of admiralty and maritime jurisdiction, yet Congress, in originally enacting the statute here involved (R. S., s. 5339), for punishment of murder committed "in a river, etc., out of the jurisdiction of any State" (3 Wheat., 387, *supra*), contemplated only such cases as were not otherwise provided for; *i. e.*, in other words, and in the language of Chief Justice Marshall in the *Bevans* case just cited:

"If there be common jurisdiction, the crime cannot be punished in the courts of the Union."

*Id.*, 388.

The Chief Justice resolves all doubt by the question:

"If two citizens of Massachusetts step into shallow water where the tide flows, and fight a duel, are they not within the jurisdiction, and punishable by the laws of Massachusetts?"

*Id.*, 389.

Such logic justifies the Chief Justice's conclusion :

"If these questions must be answered in the affirmative—and we believe they must—then the bay in which this murder was committed is not out of the jurisdiction of a State, and the [United States] Circuit Court of Massachusetts is not authorized, by the section under consideration, to take cognizance of the murder which has been committed."

*Id.*, 389.

Webster's argument in this case is so suggestive that we desire, and respectfully ask, the Court to consider it all carefully:

*U. S. v. Bevans*, 3 Wheat. 339 et seq.,

*Id.*, 4 L. ed., 405 et seq.

In the *Bevans* case, it should be noted, this Court held the Federal Court to have no jurisdiction even though the act charged was committed on board a ship of war of the United States, which was contended to be "a place within the sole and exclusive jurisdiction of the United States," under the terms of the Statute in question, and was at all events clearly "out of the jurisdiction of any particular State."

The principle of the *Bevans* case was applied nearly three-quarters of a century later in the case of *Manchester v. Massachusetts*, 139 U. S. 240, 35 L. ed., 159, when a unanimous bench, as in the *Bevans* case which it expressly followed, held that the State of Massachusetts could regulate within its Territory the liberty of fishing in the navigable waters of the United States.

*Id.*, 139 U. S.,

*Id.*, 35 L. ed., 165-167.

That the act here charged in the indictment, and which the evidence may be said to establish (Tr., pp. 93-97, 137-138, etc.), was committed within the body of the county, then the County of Oahu, now the City and County of Honolulu, see *U. S. v. New Bedford Bridge Co.*, Federal Cases No. 15,867, also Webster's argument, which the Court followed, in the *Bevans* case, *supra*, at pages 344-346.

"All ports and harbors are taken, by the common law, to be within the bodies of counties."

*Id.*, 346.

Then, if the word "State" in this statute has the usual sense of "political community"—and nothing here requires any different meaning,—the alleged crime is without the statute, because not committed "out of the jurisdiction of any particular State," but committed in the body of the County of Oahu, now the City and County of Honolulu.

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Under the Hawaiian judicial system, as continued in force by the Organic Act, the Territorial judiciary has the functions of State courts (Organic Act. ss. 81, 83), while a separate Federal judiciary is created (*Id.*, s. 86, am. 35 Stat. L. 838, Fed. Stat. Annotated, Supplement 1909, p. 152). This is quite different from the provisions which, for instance, were enacted in the case of the Territory of Washington, in which only one single judicial tribunal was created.

See *The City of Panama*, 101 U. S. 461,

*Id.*, 25 L. ed. 1061.

"Two classes of courts are created in the federal system for the exercise of the necessary original jurisdiction, but in the Territory [of Wash-



ington], as provided in the Organic Act, there is but one class of courts created for that purpose."

*Id.*, 25 L. ed. 1062-1063.

Similar, also, were the provisions enacted for the Territories of New Mexico, Utah, Colorado, Dakota, Arizona, Idaho, Montana, and Wyoming:

Revised Statutes, ss. 1907, 1909, 1910;  
while the Territory of Hawaii was provided with two sets of courts, (a) local courts and (b) Federal courts, just as in case of any State of the Union,

Organic Act, ss. 81, 86,

So, while the Republic of Hawaii ceded its territory, its public property and its rights therein and control thereof to the United States of America:

Treaty of Annexation, article II,

Revised Laws, 1905, Hawaii, p. 37,

Joint Resolution of Congress, approved July 7, 1898,

Revised Laws, 1905, Hawaii, p. 40;

nevertheless the United States forthwith vested the possession, use, and *control* thereof in the government of the newly constituted Territory of Hawaii, reinvesting sovereignty subject to the future action of Congress: see the sections of the Organic Act quoted above, covering the subjects of public lands, issuance of patents on land-commission awards, harbor improvements, wharves, landings, and "the public property ceded and transferred to the United States."

Organic Act, ss. 73, 75, 89, 91.

And the places and property within the body of the County of Oahu, or the City and County of Honolulu, as

was the harbor where the offense here charged is alleged to have been committed, or the wharf where the evidence may have tended to show the offense to have been committed (see Tr., pp. 93-97, 137-138), were places and property over which the Territory was by the Organic Act given express control and jurisdiction.

Organic Act, ss. 81, 83, 91.

Inasmuch, therefore, as the United States had so ceded to the Territory of Hawaii the *control* of these places and property, or, more strictly, having reinvested the Territory with such control, there was no jurisdiction left in the United States courts, which are courts of *limited* jurisdiction and whose jurisdiction is never presumed but must always be found in the strict letter of the law.

It is, therefore, respectfully submitted :

(1) That by the Organic Act the courts of the Territory of Hawaii have jurisdiction of the alleged crime of murder upon which the Indictment here in question is predicated ;

(2) That by the Organic Act the courts of Hawaii were given the status of State courts and exclusive jurisdiction of the said alleged crime ; and

(3) That in view of the provisions of the Organic Act and of the policy of Congress therein manifested toward this Territory, the said United States District Court had no jurisdiction of the alleged offense.

Respectfully submitted,

HONOLULU, January 28, 1910.

FRANK E. THOMPSON,  
CHARLES F. CLEMONS,  
Attorneys for Plaintiff-in-Error.

## APPENDIX

### HAWAIIAN STATUTES RELATING TO MURDER, ETC.

The Hawaiian statutes relating to murder and manslaughter, which were in force at annexation, which were continued in force by the Organic Act, sections 6 and 7, and which have ever since been in force, are as follows:

Murder is the killing of any human being with malice aforethought, without authority, justification or extenuation by law, and is of two degrees, the first and second, which shall be found by the jury.

Penal Code, 1869, Hawaii, c. 7, s. 1,

amended Laws 1890, c. 71, s. 1,

\*Penal Laws, 1897, Hawaii, s. 37,

Revised Laws, 1905, Hawaii, s. 2895.

When the act of killing another is proved, malice aforethought shall be presumed, and the burden shall rest upon the party who committed the killing to show that it did not exist, or a legal justification or extenuation therefor.

Penal Code, 1869, Hawaii, c. 7, s. 2,

amended Laws 1890, c. 71, s. 2,

Penal Laws, 1897, Hawaii, s. 38,

Revised Laws, 1905, Hawaii, s. 2896.

Murder committed with deliberate premeditated malice aforethought, or in the commission of or attempt to commit any crime punishable with death, or committed with extreme atrocity or cruelty, is murder in the first degree.

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\* The Penal Laws, 1897, Hawaii, are the statutes referred to in the Organic Act, section 1, as Ballou's compilation:

31 Stat. L. 141,

2 Supp. Rev. Stat. 1141,

56th Congress, 1st session, Act. Apr 30, 1900.

Murder not appearing to be in the first degree is murder in the second degree.

Laws, 1890, Hawaii, c. 71, s. 2,  
 Penal Laws, 1897, Hawaii, ss. 39, 40,  
 Revised Laws, 1909, Hawaii, s. 2897.

Whoever is guilty of murder in the first degree shall suffer the punishment of death.

Whoever is guilty of murder in the second degree shall be punished by imprisonment at hard labor for life or for a term of years not less than twenty, in the discretion of the court.

Laws, 1890, c. 71, s. 2,  
 Penal Laws, 1897, Hawaii, ss. 41, 42,  
 Revised Laws, 1905, Hawaii, s. 2898.

Whoever kills a human being without malice aforethought, and without authority, justification or extenuation by law, is guilty of the offense of manslaughter.

Penal Code, 1869, Hawaii, c. 7, s. 5,  
 Penal Laws, 1897, Hawaii, s. 44,  
 Revised Laws, 1905, Hawaii, s. 2899.

Manslaughter is in three degrees.

Whoever is guilty of manslaughter in the first degree shall be punished by imprisonment at hard labor, for a term of years not less than ten, nor more than twenty, in the discretion of the court.

Whoever is guilty of manslaughter in the second degree shall be punished by imprisonment at hard labor, not more than ten years or less than five years.

Whoever is guilty of manslaughter in the third degree shall be punished by imprisonment at hard labor not more than five years, or by a fine not more than one thousand dollars, in the discretion of the court.

Penal Code, 1869, Hawaii, c. 7, ss. 7-9,  
 Penal Laws, 1897, Hawaii, ss. 46-48,  
 Revised Laws, 1905, Hawaii, s. 2900.

The crime of assault and battery (see U. S. Rev. Stat. s. 5346) was and is defined and punished by:

Penal Code, 1869, Hawaii, c. 9, ss. 1-9,

Penal Laws, 1897, Hawaii, ss. 55-64,

Revised Laws, 1905, Hawaii, ss. 2907-2920.

The crime of rape (see U. S. Rev. Stat. s. 5345) was and is defined and punished by:

Penal Code, 1869, Hawaii, c. 11, ss. 1-7,

Penal Laws, 1897, Hawaii, ss. 76-82,

Revised Laws, 1905, Hawaii, ss. 2927-2933.

**SUPPLEMENTAL**

**BRIEF**

# Supreme Court of the United States.

OCTOBER TERM, 1909.

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No. 449.

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JOHN WYNNE, PLAINTIFF IN ERROR,

*vs.*

UNITED STATES.

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## **Supplemental Brief for Plaintiff in Error.**

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The record (pp. 279-302) sets forth fifty-one assignments of error, but the brief heretofore filed for the plaintiff in error sets forth only eighteen as relied upon, the same being stated by their numbers according to the original assignments; and it is stated in the brief (p. 3) that the missing numbers are those of assignments which have been abandoned.

Counsel submitting this supplemental brief has heretofore notified the Attorney-General that of the assignments thus stated to have been abandoned, assignments numbered 9 to 16, inclusive, 21 and 22, and the exceptions appearing in the record to which these assignments relate, will be relied upon, notwithstanding the disclaimer aforesaid; and this brief is addressed to a consideration of the said last-mentioned assignments.

These assignments are to be found in the record as follows: Nos. 9 to 16, inclusive, on pages 282 to 284, and Nos. 21 and 22 on page 286.

All of the said assignments relate to the question of



the sufficiency of the evidence as tending to show that the steamer Rosecrans, on which the homicide charged against the plaintiff in error was committed, was an American vessel. The exceptions to which assignments Nos. 9 to 16 relate are set forth at pages 83 to 92 of the record, and those to which assignments Nos. 21 and 22 relate are set forth on pages 97 to 101.

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### **ARGUMENT.**

The testimony in relation to the nationality of the vessel is set forth in the exceptions, and is as follows:

Over timely objection to the question "What flag does the steamer Rosecrans fly?" and on the statement of counsel for the Government that his contention was not "that the vessel flying the flag alone would go to show the registry of the vessel, but it is merely a circumstance to that effect," each of two witnesses was allowed to answer, "the American flag" (Rec., pp. 82-3).

One of these two witnesses (the Captain of the vessel) then testified that he was familiar with the seal of the Department of Customs in San Francisco; that he was familiar with the enrollment papers aboard the steamship; that he had seen what purported to be the signature of the deputy collector of customs in San Francisco, one Farley, "several times on licenses, and so on" (Rec., p. 84); that he did not know anything about Farley's writing from having seen him write; that Farley's signature appears in all the licenses aboard the vessel, all the licenses issued yearly to the ship, and that he had received such licenses himself from the custom house; and (p. 259) when they were handed to him the signature of Farley always appeared on them.

The certificate of enrollment, which was then offered

in evidence (Rec., pp. 259, 86-87), purports to have been signed by one Coey, Acting Deputy Collector of Customs, following whose official designation is the initial "W," and in respect to this feature the following occurred:

"The COURT: This is not purported to be signed by Farley, but by W. J. Coey, Acting Collector; the certificate is signed by Farley?

Mr. RAWLINS: Yes; the certificate.

The COURT: The objections are overruled" (Rec., p. 259).

The certificate here spoken of is not the certificate of enrollment itself, but what purports to be the certificate of Farley that the paper offered is a true copy of the original (Rec., p. 88), and it will be noted that the witness under examination (the Captain) being led to the point, was yet not asked whether the signature purporting to be that of Farley was in fact his, nor whether what purported to be the seal mentioned was in fact such.

Motion was made to strike out the certificate of enrollment—

"on the grounds alleged in the original objection, and, further, that it now appears upon a reading of it that it is a purported copy of an original, the absence of which is not explained, and not accounted for, and is, therefore, secondary" (Rec., p. 259).

The original grounds of objection referred to are set forth in Exception No. 12 (Rec., pp. 85-6), and also in the proceedings (Rec., pp. 258-9).

Subsequently, the same witness still being on the stand, the following proceedings were had:

"Q. What is the general reputation relative, if you know, relative to the nature of this National

Oil Transportation Company being a corporation or a copartnership, and where organized?

The WITNESS: A. That is all I know, by hearsay; I don't know the inside of any of this business at all more than running the ship.

The COURT: Q. What do you mean by hearsay, in reference to the documents?

A. No; in reference to the reputation, whether it is organized in California or not. I know it is organized in California as far as that document says so; that is why I know it, by the document; but I have no further proof than the document.

Mr. RAWLINS: Q. All you know it from is from what you saw in that paper?

A. Yes.

Mr. THOMPSON: Move that the answer be stricken out, that he knows the general reputation.

The COURT: Motion allowed" (Rec., p. 265).

This is the substance of all the testimony offered tending to show the nationality of the vessel in question; and, at the close of the case, counsel for the plaintiff in error moved for a directed verdict on, among others, the following grounds:

"4. That there is not evidence or proof herein that the ship 'Rosecrans', named in said indictment, was at the time of the act or acts charged an American vessel.

"5. That there is not evidence or proof herein of the nationality of said vessel" (Rec., p. 92).

Which motion was denied; and it is to the denial of the motion on these respective grounds that Assignments Nos. 21 and 22 relate.

The testimony is so obviously insufficient to prove the nationality of the vessel, and the grounds of objection and exception in the premises are so specific, as to render quite unnecessary any argument in support of the

proposition that the failure to prove the nationality of the vessel as a fact in the case is abundantly established.

It remains to consider the effect in law of the failure thus to prove the nationality of the vessel.

While it is no defense to an indictment, under the section of the Revised Statutes involved, that the vessel was never legally registered or enrolled, provided that she was owned by a citizen of the United States, it must yet appear that either she was registered or enrolled, or so owned by a citizen; and as a general rule, to which this case offers no exception, courts of the United States have no jurisdiction of the crime of murder when committed on board a foreign vessel.

U. S. *vs.* Plumer, 3 Cliff., 28.

See U. S. *vs.* Holmes, 5 Wheat., 412.

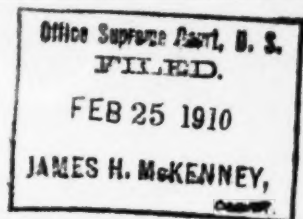
And the general rule is that such courts have no jurisdiction of the offense even when committed upon the high seas, except when committed on board a ship of the United States, unless it appears that the vessel was sailing under no national flag. *Idem.*

As the case stands, therefore, on this point, the situation is: That the homicide of which the plaintiff in error was convicted appears to have been committed upon a vessel, the ownership of which was distinctly and specifically brought in question and not established; and that such ownership not having been established as American, the court was without jurisdiction to try the offense charged; and the court below should have granted the motion for a directed verdict upon the grounds above assigned.

Respectfully submitted.

HENRY E. DAVIS,  
*For the Plaintiff in Error.*





**SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1909.**

---

**No. 449.**

---

**JOHN WYNNE, PLAINTIFF IN ERROR,**

*vs.*

**THE UNITED STATES.**

---

**OPINIONS OF SUPREME COURT OF THE TERRI-  
TORY OF HAWAII IN CASES OF HAWAII v.  
CARTER AND HAWAII v. MARTIN.**

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**TERRITORY OF HAWAII**

*v.*

**J. F. CARTER.**

Appeal from District Magistrate, Honolulu.

Argued October 1, 1908; Decided October 12, 1908.

Hartwell, C. J., Wilder and Ballou, JJ.

**CRIMINAL LAW—MISDEMEANORS COMMITTED ON NAVAL  
RESERVATION—JURISDICTION.**—The territorial district  
courts have jurisdiction of misdemeanors committed on  
land reserved for naval purposes.

*Opinion of the Court by Wilder, J.*

This is an appeal by defendant on points of law from the  
district magistrate of Honolulu, the sole question to be de-

cided being whether the district court has jurisdiction of an assault and battery committed by a lieutenant commander of the United States navy on the naval reservation in Honolulu. The land in question on which this assault and battery was committed was ceded by the Republic of Hawaii to the United States and accepted by the Newlands resolution approved July 7, 1898. On November 10, 1899, a parcel of land including the one in question was reserved by the President of the United States for naval purposes "subject to such legislative action as the Congress of the United States may take with respect thereto."

It is contended on behalf of the defendant that the territorial courts have no jurisdiction over misdemeanors committed in this Territory on land reserved for naval and military purposes. This follows, he claims, because of the constitution, or, if not, then on account of the Organic Act.

The provision of the constitution on which the defendant relies is found in Sec. 8 of Article 1, which provides that "The Congress shall have power \* \* \* to exercise exclusive legislation in all cases whatsoever \* \* \* over all places purchased by the consent of the legislature of the State in which the same shall be for the erection of forts, magazines, arsenals, dock yards and other needful buildings." It is practically admitted, and it is in fact well settled, that this provision does not apply to territories as a general rule, but it is argued that the Territory of Hawaii is practically a state within the meaning of that portion of the constitution by reason of our Organic Act having constituted a separate federal court here different from the other territories and because of its having given somewhat broader powers than usual to our governor. But whatever differences there may be between this and the other territories in those respects, it is so clear that this Territory is not a state within the meaning of the constitutional provision in question that no further reference need be made to that phase of the argument.



That portion of the Organic Act which defendant has reference to is Sec. 91 thereof, which reads as follows:

"That the public property ceded and transferred to the United States by the Republic of Hawaii under the joint resolution of annexation, approved July seventh, eighteen hundred and ninety-eight, shall be and remain in the possession, use, and control of the government of the Territory of Hawaii, and shall be maintained, managed, and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or of the governor of Hawaii."

The claim is that when this land on which the assault took place was taken "for the uses and purposes of the United States by direction of the President" that took away the jurisdiction of territorial courts over misdemeanors committed on it. The land was reserved for naval purposes before the passage of the Organic Act and consequently this section of the act has nothing to do with the question. But even if the land had been reserved afterwards, we see no merit in defendant's contention, as the section plainly has nothing to do with jurisdiction over crimes. There is nothing in the language to indicate that in parting with the "possession, use and control" of land taken for the uses and purposes of the United States, the Territory was to lose its criminal jurisdiction any more than in the case of land sold and patented to private parties.

Section 6 of the Organic Act provides "that the laws of Hawaii not inconsistent with the constitution or laws of the United States or the provisions of this act shall continue in force subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States." One of the laws of Hawaii then in existence was the statute for the violation of which the defendant was arrested, tried and con-

victed, which is now R. L. Sec. 2916. That statute was not inconsistent with the constitution or the Organic Act or any law of the United States to which our attention has been directed or which we have been able to find, and consequently Congress continued it in force. In addition, however, Congress went further and provided in Sec. 81 of the Organic Act that "until the legislature shall otherwise provide the laws of Hawaii heretofore in force concerning the several courts and their *jurisdiction* and procedure shall continue in force except as herein otherwise provided." It is not otherwise provided in the Organic Act that the jurisdiction of the territorial courts over misdemeanors of the kind in question committed on naval reservations was taken away, nor has our legislature or Congress since changed that jurisdiction in this respect. The Organic Act in conferring criminal jurisdiction does not distinguish between misdemeanors committed on land reserved for naval purposes and those committed elsewhere in the Territory. It follows, therefore, that the district court had jurisdiction in this case.

The conclusion at which we have arrived is the same as that in *Territory v. Burgess*, 8 Mont. 57, and in *Reynolds v. People*, 1 Colo. 179.

Judgment affirmed.

*W. L. Whitney, Deputy Attorney General, and F. W. Milverton, Deputy County Attorney, for the Territory.*

*M. F. Prosser (Kinney & Marx on the brief) for defendant.*

## TERRITORY OF HAWAII

v.

BLANCHE MARTIN.

Exceptions from Circuit Court, First Circuit.

Argued September 30, 1908; Decided October 15, 1908.

Hartwell, C. J., Wilder and Ballou, JJ.

TERRITORIES—CONTINUANCE OF FORMER LAW BY ORGANIC ACT.—R. L. Sec. 3151, defining and punishing fornication, was continued in force as one of the laws of Hawaii by the Organic Act, notwithstanding the Edmunds-Tucker Act of 1887 covering the same subject.

*Opinion of the Court by Hartwell, C. J.*

The defendant was convicted upon an indictment charging her with fornication, an offense defined in Sec. 3151 R. L. (P. C. 1869, ch. 15, S. 6; P. L. S. 91), punishable by fine not exceeding \$50 nor less than \$15 or by imprisonment at hard labor not more than three months nor less than one month in the discretion of the court. The offense was originally defined in Sec. 7, Ch. 13 of the Penal Code of 1850, and punishable by a fine of \$15, and in default of payment of the fine by imprisonment at hard labor for the term of four months. The defendant demurred to the indictment on the grounds (1) that by Sec. 711 R. S. "The jurisdiction vested in the courts of the United States in the cases hereinafter mentioned shall be exclusive of the courts of the several states," the cases mentioned including "all crimes and offenses cognizable under the laws of the United States;" (2) that Sec. 3151 R. L. is inconsistent with the constitution and laws of the United States and was not continued in force by Sec. 6 of the Organic Act, and (3) that no law of Hawaii

makes the act charged a criminal offense. Motions for a new trial and in arrest of judgment were filed on grounds two and three above named and also on the ground that the act of March 3, 1887, amending Sec. 5352 R. S. and defining and providing a punishment for the crime of fornication, being a law of the United States not locally inapplicable, is extended to this Territory by Sec. 5 of the Organic Act and operates to repeal or suspend Sec. 3151 R. L. Exceptions to the overruling of the demurrer and denial of the motions present the question whether the statute under which the defendant was indicted is law in this Territory.

The Act of July 1, 1862, 12 St. L. 501, is entitled "An Act to punish and prevent the practice of Polygamy in the Territories of the United States and other Places and disapproving and annulling certain Acts of the Legislative Assembly of the Territory of Utah." Sec. 1, relating to, defining and punishing bigamy "in a Territory of the United States or other place over which the United States have exclusive jurisdiction," appears in substance in Sec. 5352 R. S., "Statutes of the United States general and permanent in their nature in force on the first day of December, one thousand eight hundred seventy-three." (Sec. 5595 R. S.) The act of March 22, 1882, 22 St. L. Ch. 47, amends Sec. 5352 R. S. by defining and punishing polygamy and unlawful cohabitation. The Edmunds-Tucker Act of March 3, 1887, 24 St. L. 635, defines and punishes adultery, incest and fornication, the latter by imprisonment not exceeding six months or fine not exceeding \$100. This act contains numerous provisions relating specifically to the Territory of Utah. Secs. 1 and 2 relating to testimony in prosecutions for bigamy, polygamy or unlawful cohabitation, and Secs. 3-5 which define and punish the offenses of adultery, incest and fornication "do not mention the place of commission of any offense; and may perhaps be held to include 'any Territory or other place over which the United States have exclusive jurisdiction,' since so much of the act of March 22, 1882,

c. 47, referred to in the title of this act, as defined and punished offenses, expressly included any such Territory or place.

\* \* \* We are not now required to determine the application of those provisions of the act of 1887." *France v. Connor*, 161 U. S. 67 (1896). Sec. 18, providing the common law right of dower, was held in *France v. Connor* to be inapplicable to the Territory of Wyoming where the legislature in 1869 had enacted a statute abolishing dower and enacting a law of community of property similar to that of the civil law. There is nothing in the act of 1887 which limits its application to Utah or to any other territory in which polygamy or any other of the offenses therein enumerated had become a "practice," whereas, Sec. 1891 R. S. requires that "the constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized territories and within every territory hereafter organized as elsewhere within the United States," and by Sec. 5 of the Organic Act, "all laws of the United States which are not locally inapplicable shall have the same force and effect within the said Territory as elsewhere in the United States." Hence it is argued the act of Congress concerning the offense under consideration is the law of this Territory and precludes territorial legislation on the subject, while Sec. 6 of the Organic Act does not continue this former law of Hawaii as it is inconsistent with the United States law on the subject and also with the provision in Sec. 5 extending to this Territory, United States laws not locally inapplicable.

The defendant contends that the legislative power of this Territory extending to "all rightful subjects of legislation not inconsistent with the constitution and laws of the United States" does not authorize a law covering the same subject as is covered by an act of Congress and providing a different punishment, citing, besides other cases, *Gibbons v. Ogden*, 9 Wheat. 1, which held that the exercise by Congress of its power to regulate commerce precludes state legislation upon

the subject. *Tua v. Carriere*, 117 U. S. 201, is also cited to show that Congress having enacted a general bankrupt act under its power to establish uniform laws on the subject of bankruptcies throughout the United States a state insolvent law inconsistent therewith is suspended while the bankrupt act remains in force. "If it be true," says the defendant, "that legislation by Congress on subjects of interstate commerce and bankruptcy excludes the right of the state to legislate on the same subject and that legislation by Congress on the subject of bankruptcy operates as a supersession of then existing state laws on that subject, is it not equally true that legislation by Congress for the territories under a constitutional grant of power includes the right of a territory to legislate on the same subject, and that then existing territorial legislation is at least superseded." *Davis v. Beason*, 133 U. S. 333, holds that a statute of the Territory of Idaho disfranchising and disqualifying from holding office any "polygamist, bigamist or any person cohabiting with more than one woman," as well as any person teaching, advising or counseling bigamy or polygamy, was within the legislative power of the Territory, and that the act of March 22, 1882, had not "covered the whole subject of punitive legislation against bigamy and polygamy leaving nothing for territorial action on the subject," was a "general law applicable to all territories" and "does not purport to restrict the legislation of the territories over kindred offenses or over means for their ascertainment or prevention." The defendant relies upon the following language of the court in that case: "The cases in which the legislation of Congress will supersede the legislation of a State or Territory, without specific provisions to that effect, are those in which the same matter is the subject of legislation by both. There the action of Congress may well be considered as covering the entire ground. But here there is nothing of this kind."

Upon the exercise by Congress of its constitutional power to make bankruptcy laws uniform throughout the United States, state bankruptcy laws are necessarily superseded or

there would be no uniformity, and its power to regulate commerce *ex vi termini* excludes regulation by the states, but its power to provide for the punishment of counterfeiters does not preclude state laws having concurrent jurisdiction over such offenses. 8 Fed. Stat. Ann. 608. Hence, as well as by virtue of the constitutional power of Congress to "make all needful rules and regulations respecting the territory or other property belonging to the United States," (Art. 4, Sec. 3), decisions concerning the exclusive jurisdiction of the United States in bankruptcy and interstate or foreign commerce laws do not imply that the federal laws, penal or civil, relating to territories exclude territorial laws upon the same subject. The facts in *Davis v. Beason* were such as to leave it a matter of surmise whether the United States Supreme Court would hold that the federal act of 1887 precludes territorial legislation upon the same offenses and covering the same ground but with different penalties; but if the former law of Hawaii is authorized by the Organic Act it is unnecessary to adjudicate upon the concurrent jurisdiction of the federal court.

A large portion of the argument has been devoted to the question of the applicability of the Edmunds-Tucker Act, the defendant and the county attorney claiming that it applies, the former insisting that the jurisdiction under it is exclusive and the latter that it is concurrent with that of the Territory, while the attorney general contended that the act is inapplicable since Hawaii had laws amply providing against these offenses and did not have the polygamous practices against which the Edmunds Act and its amendments made, as he claims, for its greater effectiveness, were aimed; and it is suggested that Congress, in failing to give territorial district magistrates and circuit courts jurisdiction over the act or to provide for its more effective enforcement by the federal court upon other islands than that of Oahu, showed that it did not contemplate its application. There is, perhaps, force in this contention. These offenses were ordinarily tried by district magistrates and often went no further. It may be



said that because the federal court is not sufficiently equipped for the administration of the Edmunds-Tucker Act throughout the group or because conditions do not appear to require any other than the former laws of Hawaii on the subject is no reason to infer that Congress did not intend to apply the act and that whether it was appropriate or requisite was for Congress alone to determine. The applicability to the Territory of Oklahoma of the act of February 15, 1888, Ch. 10, 25 St. L. 33, punishing horse stealing, is denied in *U. S. v. Pridgeon*, 153 U. S. 48, 53, on the ground apparently that the later act operated as a repeal of the earlier. Possibly there were special features in that case which may distinguish it from the case at bar. But it was unquestionably within the power of Congress to continue the laws of Hawaii in force whether the federal act was extended here or not. We are of the opinion that under the Organic Act those laws were continued and therefore we do not pass upon the applicability of the Edmunds-Tucker Act. That act has been enforced here since the Organic Act took effect although we believe mainly in cases of bigamy and adultery arising on the Island of Oahu and it would not only be useless but inappropriate to pass upon the jurisdiction of the federal court under it.

The case does not present the question which has been argued at considerable length of the power of the territorial legislature to enact laws defining in the same terms the offenses named in the federal act and attaching different penalties. The decisions upon the effect of such subsequent legislation appear in the following cases: In *State v. Norman*, 16 Utah, 457, in which the defendant had been convicted of adultery under the statute of the Territory of Utah making the offense punishable by imprisonment not exceeding three years, the court regarded the language above quoted from *Davis v. Beason* as not "intended to establish a doctrine that would abrogate a territorial statute like the one now in question" and considered the *Beason* case as having been decided upon the ground stated in its opinion that the act

of 1887 "does not purport to restrict the legislation of the Territory over kindred offenses or over the means for their ascertainment and prevention." It was also held *In re Murphy*, 5 Wyo. 297, and *Territory v. Guyott*, 9 Mont. 46, that a territorial law relating to the offense of bigamy was valid and could co-exist with prior legislation under the Edmunds Act of 1862 and its amendments. On the other hand, in *Territory v. Alexander* (Ariz.), 89 Pac. 514, it is held that the federal statute supersedes the territorial statute relating to bigamy, the court regarding the Wyoming, Montana, and Utah decisions as failing to recognize the "distinction between a territory and a State in their relation to the United States," saying that "an offense against a federal law and an offense created by the territorial statute are both in effect offenses against the sovereignty of the United States," and saying, with reference to *Davis v. Beason*, that from a reading of the entire case "the implication is that had the congressional act covered the entire subject matter of the Idaho statute the latter would have been superseded by the former." It is held that in respect of bigamy the federal act applies to the District of Columbia. "The crime belongs to the criminal code of the United States and there is every reason for supposing that Congress intended uniformity in the definition of the crime and in the conditions that would excuse every prosecution, otherwise unavoidable conflicts would arise with danger, in many cases, of defeating the object and policy of the United States statute." *Knight v. U. S.*, 6 App. Cas. Dist. of Columbia, 5; and so of the offense of adultery, *Chase v. U. S.*, 7 *Ib.* 149, and *Falk v. U. S.*, 15 *Ib.* 446. The alternative, however, of the federal statute was an old statute of Maryland of the year 1715 in force in the district for the punishment of the offense by a fine of 1,200 pounds of tobacco or £3 current money, or, on failure to pay the fine, by whipping, a statute which was held not to be "adapted to the present state of society."

Confining ourselves to the question whether the former law is continued by act of Congress, the Organic Act, Sec. 81, provides that "until the legislature shall otherwise provide the laws of Hawaii heretofore in force concerning the several courts and their jurisdiction and procedure shall continue in force except as herein otherwise provided." This provision would retain the jurisdiction of magistrates and circuit courts over the offenses under former laws of Hawaii unless their continuance was unauthorized by Sec. 6 which continues in force not only the laws of Hawaii not inconsistent with the constitution or laws of the United States but those which were not inconsistent with the provisions of the act. In order that laws should not continue in force their continuance should either expressly or by clear implication be negatived or disaffirmed in other provisions of the act, the continuance not being confined to such laws as were not inconsistent with the constitution or laws of the United States. The laws under consideration are not inconsistent but in conformity with the provision in Sec. 81 by which the jurisdiction of the territorial courts remains except as otherwise provided in the act. There is significance in this express repeal in Sec. 7 of a large number of the penal laws of Hawaii which are referred to by name as well as chapter and section, as, for instance, blasphemy, vagrancy, fire arms. The attention of Congress could not fail to have been directed to a subject so important as the laws relating to the establishment and preservation of the domestic relations, the foundation of civic as well as private virtue, as well as the basis of laws regulating inheritance and alienation of property and rights and obligations of married persons and their children. If Congress had intended that laws directed to the enforcement of rules of decency and morality should be repealed they undoubtedly would have been included in the list of penal laws repealed. As the laws of Hawaii relating to the offenses named in the Edmunds-Tucker Act are not repealed expressly or by necessary implication and as their enforcement by territorial

courts is not inconsistent with other provisions in the Organic Act but is consistent with them they remain in force under Sec. 6 even if inconsistent with the Edmunds-Tucker Act. If the section had declared that laws should continue in force which were consistent with the constitution or laws of the United States or with other provisions in the act it would perhaps more clearly appear that while laws inconsistent with the constitution could not remain, those laws which were consistent with the Organic Act, conforming to all its provisions, would remain. This view conforms to the construction placed upon the act in *Carter v. Gear*, 16 Haw. 245, in which case the court said that the act "contains many different provisions bearing upon the same subject," that it "was enacted with reference to a highly developed system of government already existing," and "manifests upon its face from beginning to end an intention to continue that system except as changed in certain respects by that act." The case was affirmed in 197 U. S. 348, the court, after referring to Sec. 6, saying, "By section 7 the constitution of the Republic of Hawaii and a large number of its laws, specially enumerated, are repealed, but the statutes giving probate and equity jurisdiction to the circuit courts are not mentioned."

The statute under which the defendant is held not appearing to be inconsistent with any of the provisions of the Organic Act or with the United States constitution the defendant's exceptions are overruled.

*W. L. Whitney, Deputy Attorney General (C. R. Hemenway, Attorney General, with him on the brief), also F. W. Milverton, Deputy Attorney County of Oahu, for the Territory.*

*A. S. Humphreys for defendant.*

*Concurring Opinion by Ballou, J.*

Assuming that the Edmunds Act and the Edmunds-Tucker Act are in force within this Territory as contended by the defendant and held by the United States District Court for the Territory of Hawaii, it does not necessarily follow that the local statutes upon that subject are repealed or superseded. We held in *Territory v. McCandless*, 18 Haw. 616, that this question, there applied as between a territorial statute and a county ordinance, was one of statutory construction and quite distinct from the constitutional question as to whether, assuming both laws to be in force, a man could be punished under both for the same offense. In that case the court failed to find authority for duplicating the territorial legislation but conceded that such authority might be authorized expressly or by necessary implication. There is no constitutional difficulty in two penal statutes upon the same subject even within a territory or other possession under the immediate jurisdiction of Congress, as is shown by the case of an offense punishable under the articles of war (R. S. Sec. 1342) and by the local civil law of the Philippine Islands. *Grafton v. U. S.*, 206 U. S. 333.

The proposition that where Congress has legislated under its constitutional powers all state or local laws upon the same subject are superseded is not of universal application and is extremely uncertain in its application to penal statutes. Of the powers given to Congress and not forbidden to the states, some are exclusive while some are concurrent. Exclusive jurisdiction in matters of naturalization and bankruptcy necessarily follows from the requirement that these shall be uniform throughout the United States (*Sturges v. Crowninshield*, 4 Wheat. 122) and the power to regulate commerce among the several states is also exclusive from the necessary incompatibility between two regulations of the same subject. *Gibbons v. Ogden*, 9 Wheat. 1. On the other hand, the power to lay and collect taxes is obviously not exclusive of state legislation upon the same subject.

With regard to the exclusiveness of legislation on penal subjects the defendant relies upon the following passage: "The cases in which the legislation of Congress will supersede the legislation of a state or territory without specific provisions to that effect are those in which the same matter is the subject of legislation by both. There the action of Congress may well be considered as covering the entire ground." *Davis v. Beason*, 133 U. S. 333, 348.

As applied to penal legislation by states, this dictum seems opposed to a line of authorities of which may be cited *Fox v. State*, 5 How. 410; *Moore v. Illinois*, 14 How. 13; *Sexton v. California*, 189 U. S. 319. In *U. S. v. Arjona*, 120 U. S. 479, the court, speaking of the authority of the United States to punish offenses against the law of nations, says, "This, however, does not prevent a state from providing for the punishment of the same thing; for here, as in the case of counterfeiting the coin of the United States, the act may be an offense against the authority of a state as well as that of the United States."

So far as the penal legislation of territories is concerned, the typical case is the existence of federal penal legislation affecting a territory followed by an attempt on the part of the territorial legislature to punish the same offenses. It was on this state of facts that the conflicting cases of *State v. Norman*, 16 Utah 457; *In re Murphy*, 5 Wyo. 297; *Territory v. Guyott*, 9 Mont. 46, and *Territory v. Alexander* (Ariz.), 89 Pac. 514, were decided. The case at bar, however, does not involve the question of power of a legislature to enact penal laws inconsistent with federal legislation but merely the question as to which of two previously existing statutes was intended by Congress to apply to a new territory. In this respect the case more nearly resembles *Kie v. United States*, 27 Fed. 351 and *United States v. Clark*, 46 Fed. 633 in which penal laws of the United States were held to take precedence over the laws of Oregon applied by the act of May 17, 1884 (23 St. at L. 24), to the Territory of Alaska.

If these cases are applicable, murder and manslaughter must be withdrawn from the jurisdiction of the territorial courts in Hawaii, where the usual double jurisdiction is divided between the federal and territorial courts. These cases, however, seem irreconcilable with the later and controlling case of *United States v. Pridgeon*, 153 U. S. 48. In that case, previous to the organization of the Territory of Oklahoma, horse stealing in the Indian country might have been punished under the general provisions of R. S. Sec. 5356 relating to larceny in any place under the exclusive jurisdiction of the United States or under a special act concerning horse stealing in the Indian Territory (Act February 15, 1888, ch. 10; 25 St. at L. 33). Upon the organization of the Territory of Oklahoma Congress extended to the new territory for a certain period certain laws of the State of Nebraska, including the entire criminal code, "in so far as they are locally applicable and not in conflict with the laws of the United States or with this act." This language is substantially similar to that in which Congress extended the criminal code of the Republic of Hawaii over the new territory (Organic Act, Sec. 6). In the Oklahoma case the supreme court held, answering a certified question, that horse stealing in the Indian country during the period mentioned was not a crime against the United States, the previous federal legislation having been superseded by the corresponding provision of the Nebraska code.

While the application of this case might lead us further than the court has found it necessary to go in this case, it certainly supports the proposition that local territorial penal legislation may be in force within a territory notwithstanding the existence of general federal legislation which would otherwise be applicable. An examination of our Organic Act leads to the same conclusion.

Upon the annexation of the Republic of Hawaii to the United States all local legislation would, under the principles of international law, remain in force until action



by the legislative power of the latter. Turning now to Secs. 6 and 7 of the Organic Act, we find that there is no express repeal of the laws of Hawaii upon the general ground of their inconsistency with the laws of the United States. If Sec. 6 stood alone the implication that inconsistent laws were repealed would probably follow from the continuing in force of the laws not inconsistent, but it would still be a repeal by implication, the necessity for which is excluded by Sec. 7, which specifically repeals over seven hundred sections and parts of sections of the laws of Hawaii by reference to both subject and number.

"The inference is almost irresistible that Sec. 7 contains all the Hawaiian laws which Congress intended to designate as inconsistent with the laws of the United States, and that in view of the retention of the local Hawaiian tribunals to deal with local law and the establishment of a separate United States district court to deal with federal questions, Congress did not consider as inconsistent the retention on the statute books of local laws upon subjects covered by federal statutes, even though the local law was to be administered by different tribunals and might result in different penalties. This view is somewhat strengthened by the inadequacy of the machinery bestowed upon the federal court upon the supposition that it was to do the police work of the entire Territory in regard to offenses against morality, to say nothing of murder, manslaughter and every other crime punishable under a United States statute. The question being one of statutory construction it appears clear that the local statute under which the defendant was convicted is in force."

IN THE SUPREME COURT FOR THE TERRITORY  
OF HAWAII.

I, Henry Smith, Clerk of the Supreme Court and Judiciary Department of the Territory of Hawaii, do hereby certify that the printed papers to which this certificate is attached, and which are respectively stamped with the seal of said Supreme Court, are the advanced sheets of the official report, Vol. XIX of the Territorial Reports of opinions and decisions of said Supreme Court, and that pages from 198 to 214, inclusive, contain the authentic reports of the cases entitled: "The Territory of Hawaii v. J. F. Carter" and "The Territory of Hawaii v. Blanche Martin."

Witness my hand and the seal of said Court this 28th day of January, 1910.

[SEAL.]

HENRY SMITH,  
*Clerk Supreme Court and  
Judiciary Department.*



# In the Supreme Court of the United States.

OCTOBER TERM, 1909.

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JOHN WYNNE, PLAINTIFF IN ERROR,	} No. 449.
v.	
THE UNITED STATES.	

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*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE TERRITORY OF HAWAII.*

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## BRIEF ON BEHALF OF DEFENDANT IN ERROR.

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### STATEMENT OF THE CASE.

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The indictment in this case was found under section 5339, Revised Statutes, the portion of which that is pertinent to this case reads as follows:

Every person who commits murder \* \* \*.

Second. Or, upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State.

Third. Or who, upon any such waters, maliciously strikes, stabs, wounds, poisons, or shoots at any other person, of which striking, stabbing, wounding, poisoning, or shooting such other person dies, either on land or at sea, within or without the United States, shall suffer death.

There are four counts in the indictment. In all of them it is alleged that the murder was committed in

the harbor of Honolulu, in the district and Territory of Hawaii, and within the admiralty and maritime jurisdiction of the United States of America and out of the jurisdiction of any particular State of the United States of America. In two of the counts, the locality is described as a certain *haven* of the Pacific Ocean, while in the other two it is described as a certain *arm* of the Pacific Ocean. In two of the counts it is alleged that the deceased died on the vessel, while in the other two it is alleged that he died on the island of Oahu.

#### ARGUMENT.

##### I.

**The United States District Court for the Territory of Hawaii had jurisdiction of the offense.**

It is insisted on behalf of the plaintiff in error that the courts of the government of the Territory of Hawaii alone had jurisdiction to try the accused. This contention is not maintainable for the following reasons:

First. *The United States courts had jurisdiction of this offense prior to the passage of the act of April 30, 1900, to provide a government for the Territory of Hawaii (31 Stat., 141).*

It is insisted by plaintiff in error that the phrase "particular State," as used in this statute, is not limited to the several States of the Union, but that it also includes any other government which is regularly organized and has courts in which punishment for offenses may be inflicted.

Such has never been the meaning attached by the courts to this expression, as appears from the following authorities:

In *United States v. Ross* (1 Gall., 626) Mr. Justice Story, in construing this statute, said:

The first question to be decided is whether the court has jurisdiction over the offense, as proved in the evidence; or in other words, Was the offense committed *on the high seas*, within the true intent and meaning of the act of the 30th of April, 1790 (ch. 9, sec. 8)? From the language of the act I am of opinion that the words "high seas" mean any waters on the sea coast which are without the boundaries of low-water mark, although such waters may be in a roadstead or bay within the jurisdictional limits of a foreign government. Such is the meaning attached to the phrase by the common law, and supported by the authority of the admiralty perhaps to a more enlarged extent. The additional words of the act, "in any river, haven, basin, or bay out of the jurisdiction of any particular State," refer to such places *without any of the United States, and not without foreign States*, as will be very clear on examining the provision as to the place of trial, in the close of the same section.

In *St. Clair v. United States* (154 U. S., 144), in passing upon the sufficiency of a demurrer to the indictment drawn under this statute, the court used the following language:

The objection, upon demurrer, that the indictment did not sufficiently show on what

part of the high seas the offense charged was committed, is met by the averment that the offense was committed on board of an American vessel, on the high seas, within the jurisdiction of the court and within the admiralty and maritime jurisdiction of the United States, and not within the jurisdiction of *any particular State of the Union*. Nothing more was required to show the locality of the offense.

In *Andersen v. United States* (170 U. S., 489), in passing upon the sufficiency of an indictment based upon this statute, the court said:

The cause assigned in support of the demurrer to the indictment was that it did "not specify the locality on the high seas where the alleged offense occurred." The objection was without merit. The indictment alleged the murder to have been committed "on the high seas and within the jurisdiction of this court and within the admiralty and maritime jurisdiction of the said United States of America, and out of the jurisdiction of *any particular State of the said United States of America*, in and on board of a certain American vessel \* \* \*." Nothing more was required to show the locality of the offense.

It will be observed that all of those indictments were drawn upon the theory that the word "State" as used in the statute had reference to a State of the United States, and in each case they were treated as sufficient by the court. If, however, the word "State" as used had the meaning insisted upon by



plaintiff in error, those indictments were not sufficient, because they did not allege the necessary jurisdictional fact that the offense was committed outside of the United States *or any other state or government*. A careful examination of the authorities has failed to disclose any case in which it has been intimated that the words "particular State" as here used refer to any kind of government other than a State of the Union.

Plaintiff in error cites *United States v. Bevans* (3 Wheat., 336) in support of his contention, but the decision in that case has no bearing upon this question. The facts in that case were that Bevans was indicted for murder in the United States Circuit Court for the District of Massachusetts, and it appeared in evidence that the offense was committed by the prisoner on board a United States ship of war which was lying at anchor in the main channel of Boston Harbor. The court found that the place where the vessel was located was in the State of Massachusetts, and therefore held that while Congress had power to provide for the punishment of offenses committed by persons serving on board a ship of war of the United States wherever that ship might lie, yet Congress had not exercised that power in the case of a ship lying in the waters of the United States. No such question is here presented, as the statute is made by express language to apply to all waters which are not within the limits of the same State.

This section of the Revised Statutes was taken from the act of April 30, 1790, which was enacted

before there were any organized territories, and consequently it could not have been intended to exclude from its operation the waters within any territory, and there has been no intimation upon the part of Congress, in any general law, of a purpose to change this original meaning in the least.

The remaining inquiry, therefore, is whether there has been any special legislation as to the Territory of Hawaii which excludes the operation of this statute therefrom.

*Second. There is nothing in the act under which the territorial government of Hawaii was organized which either expressly or by implication affects said Section 5339, Revised Statutes, or indicates that it was the intention of Congress to deprive the United States court of jurisdiction to try an offender for the crime of murder committed in any place mentioned in said section within the jurisdiction of said Territory of Hawaii.*

The following sections of the act under which the government of the Territory of Hawaii was organized are cited and relied upon by plaintiff in error (31 Stat., 141):

SEC. 5. That the Constitution, and, except as herein otherwise provided, all the laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States. \* \* \*

SEC. 6. That the laws of Hawaii not inconsistent with the Constitution or laws of the United States or the provisions of this act

shall continue in force, subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States.

Clearly these sections do not have the effect contended for. The purpose of section 6 was only to continue in force all laws which had theretofore existed in Hawaii, except such as were repealed by the act and were inconsistent with the Constitution and laws of the United States, while the purpose of section 5 was to extend the Constitution and laws of the United States to the Territory of Hawaii. While the same laws, except as modified by this act, had theretofore been in force in Hawaii, yet, as above shown, one who committed murder on a vessel of the United States in the harbor of Honolulu, though within the waters of the government of Hawaii, was subject to trial in the United States court; and since the only effect of these sections was to continue in force the laws previously existing, except as repealed and modified by the act, they could not have the effect of depriving the Federal courts of the jurisdiction which they theretofore possessed. Counsel also refer to section 81, wherein it is provided that "until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the several courts and their *jurisdiction* and procedure *shall continue in force*, except as herein otherwise provided;" and section 83, which provides "that the laws of Hawaii relative to the judicial department, including civil and *criminal procedure*, except as amended by this act, are continued in force, subject to modification by Congress or the legislature." But these sections do noth-

ing more than to leave the jurisdiction of the courts of Hawaii precisely as it was before the passage of the act, and certainly do not have the effect of increasing their jurisdiction to such an extent as to deprive the Federal courts of the jurisdiction which they had previously possessed under section 5339, Revised Statutes. Section 89 is also cited, which provides that "the wharves and landings constructed or controlled by the Republic of Hawaii on any sea-coast, bay, roadstead, or harbor shall remain under the control of the government of the Territory of Hawaii;" and also section 91, which provides that the public property which had been ceded to the United States by the Republic of Hawaii should remain in the use, possession, and control of the government of the Territory of Hawaii. But these sections have no bearing upon the jurisdiction of courts, either Federal or Territorial.

It is further insisted in argument that if it should be held that the Federal court has jurisdiction of this offense when committed in the harbor of Honolulu, it might with equal consistency be held that it has jurisdiction of a murder committed at any other place in the Territory of Hawaii; and that other crimes defined by statute as rape, assault and battery, and manslaughter committed at any place upon the island might be tried in the Federal court.

Such a conclusion does not at all follow, because the statute by its express terms limits the jurisdiction of the Federal court to these offenses when committed in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty and mari-

time jurisdiction of the United States, and does not undertake to vest in the Federal court jurisdiction to try an accused for either of these offenses when committed elsewhere in the Territory of Hawaii than in one of the places specifically enumerated. Congress, however, could undoubtedly extend the jurisdiction of the Federal court so as to confer upon it the power to try one accused of either of those offenses when committed at any place in the Territory of Hawaii, but it has not seen proper to do so.

## II.

**It is sufficiently proven by competent evidence that the vessel *Rosecrans*, upon which the murder was committed, was owned by the National Oil and Transportation Company, a corporation organized under the laws of the State of California.**

It is proven that the murder was committed upon the vessel *Rosecrans*, and that this vessel flew the American flag. (R., pp. 137, 158, 173, 256.) A certified copy of the certificate of enrollment of the vessel was offered, and, over objection, was admitted by the court as evidence. This certificate shows that the vessel was enrolled on June 20, 1905, and that it was owned by the National Oil and Transportation Company, of San Francisco, a corporation organized under the laws of the State of California. (R., pp. 86, 87, 88.) The introduction of this certified copy was objected to on the following grounds:

(a) That there was no evidence that it came from the office of the Collector of Customs of the District and Port of San Francisco.

(b) That it does not appear that N. S. Farley, who certified to its correctness, was deputy collector of the port.

(c) That it was not authenticated as required by statute.

(d) That there was no proof that it is a copy of the document sought to be proved except that it is marked "copy" and purports to be certified by N. S. Farley.

(e) There is no proof that the certificate was in force at the time of the murder.

(f) It appeared that the certificate was signed, not by Farley, but through some person who initialed himself "W."

(g) There was no evidence that the witness who testified with regard to the signature of Farley knew his signature.

(h) There is no proof that it was Farley's genuine signature.

(i) There was no evidence as to the purported seal of the department.

Neither of these grounds is well taken for the following reasons:

The copy is authenticated by a certificate which reads as follows (R., p. 88):

DISTRICT AND PORT OF SAN FRANCISCO.

I hereby certify the within to be a true copy of the original issued by this office.

Given under my hand and seal this 5th day of October, 1907.

[SEAL.]

N. S. FARLEY,  
*Deputy Collector of Customs.*  
W.

In section 4142, Revised Statutes, the specific requirements for registering a vessel are set forth.

By section 4155, Revised Statutes, it is provided that when the several matters hereinbefore required, in order to the registering of any vessel, have been complied with, the collector of the district comprehending the port to which she belongs shall make and keep in some proper book a registry thereof, and shall grant a certificate of such registry, as nearly as may be, in the form following (then follows a form to which the certificate of enrollment introduced in this case precisely conforms).

By section 4312, Revised Statutes, it is provided that in order for the enrollment of any vessel, she shall possess the same qualifications, and the same requirements in all respects shall be complied with, as are required before registering a vessel; and the same powers and duties are conferred and imposed upon all officers, respectively, and the same proceedings shall be had, in enrollment of vessels, as are prescribed for similar cases in registering; and vessels enrolled, with the masters or owners thereof, shall be subject to the same requirements as are prescribed for registered vessels.

By section 4332 it is provided that a naval officer residing at the port shall also sign the certificate, and the certificate, a certified copy of which was used in this case, was signed by E. W. Maslin, deputy naval officer.

Section 2630 provides that every collector of the customs shall have authority, with the approval of the Secretary of the Treasury, to employ within his



district such number of proper persons as deputy collectors of the customs as he shall deem necessary; and such deputies are declared to be officers of the customs. And in cases of occasional and necessary absence, or of sickness, any collector may exercise his powers and perform his duties by deputy, duly constituted under his hand and seal, and he shall be answerable for the acts of such deputy in the execution of such trust.

Section 2633 provides that the Secretary of the Treasury is authorized, whenever in his opinion the public interest demands it, to clothe any deputy collector at port other than the principal port of entry with all the powers of his principal appertaining to official acts; and he may require such deputy to give bond to the United States, in such amount as the Secretary may prescribe, for the faithful discharge of his official duties.

And section 882 provides that copies of any books, records, papers, or documents in any of the Executive Departments, authenticated under the seals of such Departments, respectively, shall be admitted in evidence equally with the originals thereof.

No objection is raised to the sufficiency of the certificate of enrollment itself, but all objections except (*e*) in effect deny that the copy was sufficiently authenticated to justify its introduction as evidence. From the foregoing statutes it appears that this certificate of enrollment was entered of record in the office of the collector of customs at the port of San Francisco; that it is, therefore, a record of that

office; and that the Secretary of the Treasury was authorized to employ a deputy collector for that port who possessed the authority of the collector.

The correctness of this copy purports to have been certified to by N. S. Farley, deputy collector of customs, with the seal attached.

It is a general rule that courts will notice without proof the signatures and official seals of public officers. (17 Amn. & Eng. Enc. of Law, 918, and numerous cases cited.) In *Himmelmann v. Hoadley* (44 Cal., 214) it was held that courts will take judicial notice of the officers of a county and of the genuineness of their official signatures and of the genuineness of the official signatures of such deputies as the law authorizes them to appoint. This is a universal rule, and it is believed that no authorities can be found to the contrary. The general rule with reference to the effect of a seal attached to a document is thus stated in 3 Wigmore on Evidence, section 2161:

So far as a particular seal or signature is held to admit a document, the seal or signature evidences the document as genuinely executed by the purporting person, and his official character is assumed without evidence.

In objection (*f*) it is insisted that Farley's name to the certificate was not written by him, but by some one in the office whose initial was W. There is nothing in the record to indicate that such is the fact. It is true that the letter W appears immediately below "deputy collector of customs," but any one familiar with the custom of initialing in govern-

ment offices knows that this letter was the initial of the person who prepared the copy and presented it to Farley for his signature.

In objection (e) it is insisted that there is no proof that the certificate was in force at the time of the murder. The certificate is dated June 20, 1905. The murder was committed on September 20, 1907. There is no statute requiring that the vessel be reregistered unless it should change owners, and the presumption is that it continued to be the property of the National Oil and Transportation Company until the contrary is shown. The evidence above cited that the vessel continued to fly the American flag would indicate that there had been no change of ownership.

From the foregoing, it is insisted that the judgment of the trial court below should be affirmed.

J. A. FOWLER,

*Assistant Attorney-General.*

FEBRUARY, 1910.

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